TABLE OF CONTENTS

Page

EXCERPTS FROM REPORTER'S TRANSCRIPT 1

Testimony of Thurmon L. Radford:
- Direct Examination 3
- Cross-Examination 12

Testimony of Willis Heldreth:
- Cross-Examination 13

Testimony of M. Birney Wright:
- Direct Examination 14
- Cross-Examination 17
- Redirect Examination 19

EXHIBITS:

- G. C. Exhibit 10 19
- G. C. Exhibit 11 22
- G. C. Exhibit 12 23
- G. C. Exhibit 14 24
- G. C. Exhibit 15 25
- G. C. Exhibit 17 26
- G. C. Exhibit 18 28
- G. C. Exhibit 21 29
- G. C. Exhibit 23 30
- G. C. Exhibit 27 31
- Exhibit R. 1 33
- G. C. Exhibit 4a 34
- Exhibit R. 4 35

Page

BOARD'S DECISION AND ORDER 36

Order 40

INTERMEDIATE REPORT 42

Statement of the Case 42

Findings of Fact 43

I. The Business of the Respondent 43

III. The Unfair Labor Practices 44

A. The Issues 44

B. The Facts 45

C. Conclusions 60

IV. The Effect of the Unfair Labor Practices Upon Commerce 68

V. The Remedy 68

Conclusions of Law 69

Recommendations 71

Appendix 74

MOTION OF RESPONDENT 76

	Original	Print
Proceedings in the U.S.C.A. for the Fourth Circuit	2a	1
Appendix to respondent's brief—see separate index	2b	1
Argument and submission (omitted in printing)	26	25
Opinion, Dobie, J.	28	25
Dissenting opinion, Soper, J.	36	32
Judgment	39	33
Clerk's certificate (omitted in printing)	41	
Order allowing certiorari	42	34

United States Court of Appeals for the Fourth Circuit

No. 7127

OLIN MATHIESON CHEMICAL CORPORATION,

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent

On Petition for Review of an Order of National Labor Relations Board

APPENDIX ON BEHALF OF PETITIONER

EXCERPTS FROM REPORTER'S TRANSCRIPT May 16, 1955

[TR. PP. 12-15]

MR. THACKERY: Mr. Examiner, we have been given the privilege of looking at Company records, by counsel, in respect to certain seniority problems involved in the case regarding 8(3)s which have been alleged, and after examination of the records it is the conclusion of counsel of the General Counsel and the Charging Parties herein that certain individuals alleged should be omitted from the com-

plaint in view of the fact that an examination of these records shows the individuals whom we shall name would have been laid off by the company even under former security seniority regulations.

We understand that if the six individuals are omitted that Company counsel would stipulate that the remaining seven were laid off on or about April 9, 1954, pursuant to the seniority provisions submitted to the union on April 2, 1954 by the Company, and that these individuals under the seniority system prevailing prior to April 2, 1954 would not have been laid off on or about April 9th.

* * *

MR. STULL: I have one suggestion, Mr. Trial Examiner, in connection with identification of the seniority existing prior to, I think — I think Mr. Thackery said prior to April 2nd.

* * *

* * * My suggestion would be that you refer to the prior seniority as the seniority that existed under the contract.

* * *

MR. THACKERY: Counsel for the General Counsel at this time requests oral stipulation that the seven individuals named in the Complaint, as amended, namely Robert Permar, Francis Ruggerio, Michael D. Eddy, Sr., Wayne O. Mayfield, Herman Morris, C. B. Smyth and Elwood Frum, were laid off by the company on or about April 9, 1954, pursuant to certain seniority provisions submitted to the union on April 2, 1954, and that these individuals under the seniority system prevailing prior to April 2, 1954 under the contracts, General Counsel's Exhibits 4(a), (b) and (c), would not have been laid off on April 9, 1954, and that, in case of each of these seven individuals, an individual or individuals of less seniority under the contracts who re-

turned to work during the strike period February 4th to March 17th was or were retained in employment. Will counsel so stipulate?

MR. STULL: Counsel will so stipulate.

* * *

[TR. PP. 34]

MR. THACKERY: I propose at this time an oral stipulation that Raymond C. Sansbury, S-a-n-s-b-u-r-y, returned to work during the course of the strike, and was retained in the employment of the company although he had less seniority under the system prevailing prior to April 2nd than Francis Ruggerio. Will counsel so stipulate?

MR. STULL: I think the stipulation, if it is to be made, should be to the effect, as well, that Raymond C. Sansbury engaged in the strike and was active in the strike.

MR. THACKERY: That can be stipulated.

TRIAL EXAMINER: If you want to include that, it is agreeable. The witness has testified to it.

MR. THACKERY: Will counsel so stipulate?

TRIAL EXAMINER: With that amendment?

MR. STULL: Yes.

* * *

Testimony of Thurmon L. Radford

DIRECT EXAMINATION

[TR. PP. 38-41]

BY MR. THACKERY:

Q Your name is Thurmon Radford?

A That is correct.

Q You are business representative of Local 152 of the Pipe Fitters?

A Yes, sir.

* * *

Q Have you, within the last several years, represented your union in negotiations with Mathieson and Olin?

A I have.

Q When did you last begin negotiations with this company, Mr. Radford?

A November, 1953. When you say "last begun" I assume you mean the series of events leading up to this time.

Q That's right. What did you do on or about November 24th, 1953?

A I sent the company a letter notifying them of our desire to modify the terms of the collective bargaining agreement between the company and our union.

* * *

BY MR. THACKERY:

Q I show you General Counsel's Exhibit 6 for identification and ask you what that is.

A It is a letter from the Mathieson Chemical Corporation, acknowledging our letter and advising us that they, too, had intentions of modifying the agreement, and stating that they would set a mutually agreed-upon time for a meeting at a later date.

* * *

BY MR. THACKERY:

Q Did you at any time during the course of the negotiations represent any other unions, Mr. Radford?

A Yes, sir. Prior to beginning negotiations with Mathieson Chemical Corporation we held a joint committee meeting between the three AF of L unions that represented

certain of the employees, certain maintenance employees of the Mathieson Chemical Corporation, and I was chosen as the spokesman for the three unions, and by the "three unions" I mean the IBEW, Local 425, and the Carpenters.

Q If you know, did the other unions, regardless of the fact that you represented them, did they also notify the company?

A They did.

* * *

[TR. PP. 44-46]

BY MR. THACKERY:

Q Did you thereafter — and I refer to the notification, Mr. Radford — did you thereafter meet with the company in bargaining sessions?

A I did.

Q Can you describe how many meetings there were, to the best of your recollection, and when they occurred? The period in which they occurred?

A The negotiation sessions began on or about January the 10th, 1954, and between that date and February — and February 10th, 1954 — we held approximately twelve negotiating sessions.

Q Do you recall meetings on February 17th?

A Yes, sir.

* * *

Q Do you recall a meeting on February 24th, Mr. Radford?

A Yes, sir.

Q What was significant about that meeting, if anything?

A On February 24th, that was about the eve of the

strike, I think. During the course of negotiations the Federal Mediation and Conciliation Service people were present, and they discussed the various issues with us, * * *

* * *

BY MR. THACKERY:

Q I show you General Counsel's Exhibit 10 for identification, and ask you what that is.

A This is a copy of a telegram that was sent to the Federal Mediation and Conciliation Service in behalf of the three AF of L local unions involved in this proceeding, and in behalf of the Mathieson Chemical Corporation.

Q Were you present when this telegram was sent?

A Yes, Mr. Kileen and I left the plant property and came over to the telegraph office together, and sent the telegram and shared the cost of sending it.

* * *

[TR. PP. 48-51]

Q All right. Did you take any action with respect to the three unions in anticipation of your difficulties, or did your difficulties create any situation about which you took any action?

A We took a strike vote.

Q When did you take that, Mr. Radford? About when did you?

A It was in the week of the 17th there, and we had advised the company, as I recall, at that time, that we intended to strike on February—midnight, February the 24th, as I recall.

Q Did the strike actually take place?

A Yes, sir.

Q And you say it took place on the 24th?

A Yes, sir.

Q Is that right?

A Midnight.

Q How long did it last?

A Until March 17th at noon. Noon, March 17, 1954.

* * *

BY MR. THACKERY:

Q I show you General Counsel's Exhibit 11 for identification, and ask you what that is.

A It is a copy of a letter sent from the Mathieson Chemical Corporation to me under date of March 15, 1954, advising me that the company would start to interview applicants for some of the jobs which were formerly filled by striking employees.

* * *

Q Did you do anything else at that time?

A Well, I was contacted by a citizen's committee that had been formed during that period of time. I was also contacted by the State Department of Labor. I mean they sent me a telegram and asked me if we would be willing to meet with one of their representatives, and we replied that we would, and I was later told that the company had took the position that any meetings that were brought about would have to be brought about through Federal Mediation and Conciliation Service. * * *

They [the citizens' committee] contacted me two or three times on the evening—on the evening of the 16th of March—and asked me eventually—eventually they said, "If this citizens' committee would request you to return the striking employees to work at the plant, and negotiations would be resumed, and you return them to work under the terms of the old agreement, would you be agreeable?"

I advised them that I would, and I did return the employees to work at noon the next day.

Q Did that include members of all of the unions?

A That's correct.

* * *

[TR. PP. 55-57]

BY MR. THACKERY:

Q Did you have a meeting at about this time, Mr. Radford?

A Yes, sir.

Q Do you remember when the meeting was?

A April 2, 1954.

* * *

BY MR. THACKERY:

Q I show you General Counsel's Exhibit 15 for identification and ask you what that is.

A It is a copy of the seniority proposal of the company, which was made April 2, 1954, at that meeting.

Q Can you describe the circumstances of the presentation, if it was presented? That proposal?

A Yes, sir. At this meeting when we went into this session I sought the company's position with respect to reaching an agreement with our union and was advised that the company had an all-inclusive proposal to make. They offered to sign an agreement with us for, as I recall it, for one year from date of signing, including all of the clauses which we had tentatively agreed upon prior to the strike, with no change—with one exception. That dealing with seniority. And they stated on the matter of seniority they proposed this seniority clause, and that it would give seniority for layoff purposes to all employees who remained at

work during the strike or who crossed the picket line or who were hired during the course of the strike, over and above the employees who remained away from work during the entire duration of the strike.

They further announced that they were going to lay off ninety-four men in the maintenance department on April 9th, which was one week from that meeting, and that they intended to lay them off in accordance with this policy.

Q And you are referring to General Counsel's Exhibit 15 when you say "this policy"?

A That is correct; and the other item, they proposed no change whatsoever in wage rates. I told them that the proposal was ridiculous and that I could probably make one that would be just about as ridiculous, to put those employees on the other end of the seniority list, and that proposal was totally unacceptable to the unions, and then I was asked by Mr. Kileen whether or not we wanted the company to leave the proposal open for a period of five days.

I replied that he could leave it open indefinitely as far as I was concerned. That we would never agree to it.

Q Were there other lay-offs made on April 9th, other than maintenance employees, if you know?

A Yes, sir.

Q What were the types of employees laid off?

A They laid off ninety-four maintenance workers and approximately sixty production workers.

Q When you say ninety-four maintenance workers, are you referring to job classifications covered by the certifications as listed in the complaint, or let me put it another way.

Are you referring to the job classifications of employees represented by the three unions involved in this proceeding?

A Those, and some others that were outside of the unit, but by and large they were in our unit. * * *

* * *

[TR. PP. 60-62]

BY MR. THACKERY:

Q I show you General Counsel's Exhibit 17 for identification and ask you what that is.

A That is the reply from the Mathieson Chemical Corporation to me, a reply to the letter we were just discussing.

Q What did you do as a result of this letter, if anything?

A Well, in this letter the company stated that they saw nothing to be gained in meeting with us, and that if they did meet with us they felt it would be futile, and so—the letter—I took the letter as a refusal to me.

* * *

BY MR. THACKERY:

Q I show you 18 for identification and ask you what that is.

A It is a letter that I received from the Mathieson Chemical Corporation under date of February 12, 1955, stating that they hadn't heard from me since April 27th, and making certain proposals to the union.

* *

BY MR. THACKERY:

Q To your knowledge did the other unions receive notification of this kind?

A They did.

* * *

BY MR. THACKERY:

Q I will show you 19 for identification and ask you what that is.

A It is a letter that the Mathieson Chemical Corpora-

tion gave to the present president of the Carpenters' Local Union, who in turn gave it to me, and it contains the same information as contained in—practically the same as in the letter you just put in.

Q Do you know whether or not IBEW, Local 425, received such a letter?

A I was advised by Mr. Berry, the business agent, that they did.

* * *

[TR. PP. 64-66]

BY MR. THACKERY:

Q I show you General Counsel's 21 for identification and ask you what that is.

A That's a letter from the Mathieson Chemical Corporation under the date of February 21, 1955, setting the time and place for the meeting.

* * *

BY MR. THACKERY:

Q Did you, in fact, have a meeting on March 3rd, Mr. Radford?

A We did.

Q Were you, in fact, representing the Pipe Fitters, as well as Local 425 and Local 1369?

A Each of the unions had people there, but I was continuing the same as we had throughout the negotiations.

* * *

[TR. PP. 69-70]

BY MR. THACKERY:

Q I show you what has been marked General Counsel's Exhibit 26 for identification and ask you what that is.

A It is a letter that our attorney, Martin F. O'Donoghue, sent to the Mathieson Chemical Corporation, declin-

ing to execute the proposed agreement they had sent us because they contained the seniority—strike seniority—provisions, * * *

* * *

CROSS-EXAMINATION

[TR. PP. 96-98]

BY MR. STULL:

Q Did you reach any agreements with the company after February 10th, 1954?

A Well, we agreed to — we agreed to meet at a mutually agreed-upon time and place, and different things of that nature. I am at a loss to know what you mean when you say did we make agreements. If you are asking do we have a written collective bargaining agreement as a result of negotiations, the answer is no, we don't have up to and including today, * * *

* * *

Q Did you meet during the strike with the company?

A Yes, we had, as I recall it, one meeting during the strike, at the Hotel Morgan, which meeting was arranged by Mr. Rose and Mr. Gantz of the Federal Mediation and Conciliation Service, * * *

* * *

Q You don't remember that the Federal Mediation Service advised both parties that they should hold themselves in readiness for call by the Mediation Service?

A Do you want me to tell you what the Federal Mediator told me?

Q Answer my question.

TRIAL EXAMINER: I assume if he wants to know he will ask you. Just answer his question. If you can't answer it, say you can't.

THE WITNESS: The Federal Mediator told me that he felt the meeting would bring about no fruitful result, and he was going to Philadelphia. That's what he told me.

* * *

Testimony of Willis Heldreth

CROSS-EXAMINATION

[TR. PP. 107-108]

BY MR. STULL:

Q Mr. Heldreth, you say you were on the negotiating committee or you were a steward and you were on the negotiating committee attending the meeting of April 2, 1954?

A That is correct.

Q And you also attended the one on March 3, '55?

A That is correct.

* * *

Q And, Mr. Heldreth, who else represented the Electricians on the committee on the April 2nd meeting?

A Mr. Berry.

* * *

Q Do you know Mr. Ziakus?

A Yes, I do.

Q Was he a member of the negotiating committee?

A He was prior to the strike, but after the strike he sort of faded away.

Q Was he on strike at any of the time?

A Yes.

Q Were you on strike, Mr. Heldreth?

A Yes.

Q Were you a steward at that time?

A Yes, sir.

* * *

Testimony of M. Birney Wright

DIRECT EXAMINATION

[TR. PP. 151-152]

BY MR. STULL:

Q Mr. Wright, where are you employed?

A Employed by Olin Mathieson Chemical Corporation, Morgantown, West Virginia.

Q In what capacity, Mr. Wright?

A As plant manager of the Morgantown operation.

Q How long have you been so employed?

A Since September, 1951.

Q Are you familiar, Mr. Wright, with the circumstances surrounding the layoff that was made in the maintenance forces involved in the bargaining units in this proceeding on April 9, 1954?

A I am.

Q And, Mr. Wright, did you have anything to do with the determination of that layoff?

A Yes, I did.

Q What gave rise to that, Mr. Wright?

A Well, one of my main responsibilities is to see that the plant is operated as efficiently and as economically as possible. One of our major costs is maintenance cost, and that is a cost which is under continuous study. This particular time I started a study in October of 1953 of the maintenance force requirements. * * *

* * *

[TR. PP. 155-160]

TRIAL EXAMINER: May I interject just at this point? This would be material if there were any allegations in the complaint that the general layoff itself was discriminatory. That is not your claim.

MR. THACKERY: That is right.

TRIAL EXAMINER: You will concede, will you, the layoff was for economic reasons?

MR. THACKERY: Well, the —

TRIAL EXAMINER: I think the mere fact there was a layoff justifies Mr. Stull in explaining what it was, but since you concede it was not — the layoff itself — was not an unfair labor practice, all he wants to do is establish it was done for economic reasons — if you will concede that point I think we need have no further questions on the point.

MR. THACKERY: I couldn't make any concessions respecting the ninety-four inasmuch as they include the seven. I will concede the origin of the layoff may have been economical.

TRIAL EXAMINER: Well, as I understand it, you are not even claiming there was no necessity to lay off seven individuals. All you are claiming is in selecting those individuals—

MR. THACKERY: That is right, precisely.

TRIAL EXAMINER: Then the entire layoff, you are willing to concede, the general layoff, was for economical reasons?

MR. THACKERY: Yes, I will concede that.

* * *

BY MR. STULL:

Q Mr. Wright, you are familiar with the fact that there were certain individuals who were retained on the payroll,

even after the April 9th layoff, though they had in some cases less seniority than some others who were laid off,—and I say "seniority"—I mean working group seniority—were you not?

A Yes.

Q Did you have anything to do, Mr. Wright, with the retention of those people?

A I had the privilege of expressing my views with respect to those men to proper authorities in the corporation who made the final decision as to what our action would be.

Q What was your recommendation, Mr. Wright?

A Again, my prime responsibility is to keep the plant operating, and I felt —

TRIAL EXAMINER: Not what you felt. What was your recommendation? That was the question, Mr. Wright. Let's just stick to that question.

THE WITNESS: My recommendation was that since in my opinion we owed these men an obligation for as much job security as possible, that if at all possible they should be retained in the work group.

BY MR. STULL:

Q You are referring now to the men who returned to work or remained at work during the course of the strike, during which time the plant continued to operate?

A That is correct.

Q Mr. Wright, there were many employees not represented by the unions involved in this proceeding who were working or employed by the company at that plant?

A Yes.

Q Did they continue to work during the strike?

A Yes, they did.

Q * * * Since the layoff of April 9th, Mr. Wright, what has been your experience at the plant with the performance of maintenance work?

A It has been adequate.

Q Has there been any appreciable change in the size of the maintenance work groups which were involved in the layoff of those represented by the unions that are involved in this proceeding?

A No appreciable change. We did underestimate the number required in the welding group because of an unexpected amount of welding that came up, and we did recall two welders that I am sure of.

Q But since April 9th you said there has been no appreciable change up to this time?

A No.

Q In the maintenance field?

A No.

MR. STULL: That's all I have.

TRIAL EXAMINER: Mr. Thackery, any questions?

CROSS-EXAMINATION

BY MR. THACKERY:

* * *

Q Are you familiar with the clause of the contract—and I refer to the agreement between Mathieson Chemical Corporation and the United Brotherhood of Carpenters and Joiners and the other two unions involved in this proceeding—as follows:

"If the operation of this seniority clause"—and I refer in

this respect to the old seniority clause—prior to April 2nd —and also applies to the new clause shown in General Counsel's Exhibit 24(a), (b) and (c), as follows:

"If the operation of this seniority clause"—and that refers to both seniority clauses—"tends to eliminate skills which would be required in an efficient operation of the plant, the union will work out with the company a program which will permit the retention of skills necessary to continue efficient operation of the plant."

Are you familiar with those clauses?

A I am. — I believe I have read them, yes.

Q Did you consult the pipe fitters, the carpenters, and/or the IBEW, with respect to these skilled layoffs?

A No.

TRIAL EXAMINER: Well, let me ask you this. Are you claiming the contract was in existence at that time?

MR. THACKERY: The clause which I have just quoted not only exists in the original contracts, that is, General Counsel's Exhibits 4(a), (b) and (c), but it exists in the proposed contracts, General Counsel's Exhibits 24(a), (b) and (c).

TRIAL EXAMINER: That may be a fact, but are you claiming that at the time—at that time in April, or when the recall—after the April layoff—that there was any contract in existence, or had there been any contract in existence since February 10th?

MR. THACKERY: Well, it seems to me a good-faith bargaining posture or position would require, in view of the fact they were attempting to put a unilateral alteration of seniority into the effect, would require at least some attention to the old clause and also in the new clause respecting the operation of any seniority clause.

TRIAL EXAMINER: That would work both ways, wouldn't it?

MR. THACKERY: The union wasn't called in.

TRIAL EXAMINER: There was a no-strike clause.

MR. WARD: That contract expired.

TRIAL EXAMINER: That's my point.

* * *

REDIRECT EXAMINATION

[TR. PP. 162-163]

BY MR. STULL:

Q Mr. Wright, with respect to this layoff list, was the size of the layoff determined in March, or was that earlier?

A That was determined earlier than March, yes.

Q When did you conclude the size of the layoff involving these groups?

A The early part of February, 1954.

* * *

EXHIBITS

G. C. Exhibit 10

2-10-54

Martin J. O'Connell, Director Federal Mediation and
Conciliation Service
144 Tariff Building
8th and F Sts N.W.
Washington 25 D.C.

Dear Sir:

A dispute exists within the meaning of Sec 8(d) of the Labor Management Relations Act between the unions and

the Company listed below

The 60 day notice required by law was filed by the U. A. of Journeymen & Apprentices of the Plumbing & Pipefitting Industry, Local 152 on November 24, 1953, by the United Brotherhood of Carpenters and Joiners of America Local 1369 on November 12, 1953 and by the International Brotherhood Electrical Workers Local 425 on Dec 8 1953.

All these unions are AFL

Their addresses are as follows

I.B.E.W. Local 425 Room 218 Professional Bldg Fairmont W. Va. Attention W. A. Berry Business Agent phone Fairmont 2869 or Core 2R8

Carpenters Local 1369 c/o C. B. Smyth, Pres., 311 Spruce St., Morgantown, W. Va., Phone 6137

Pipe Fitters Local 152, Attention Mr. Thurmon Radford Business Agent 231 Chestnut St., Morgantown, W. Va., Phone 4631, Res. 8818

The name of the Company is Mathieson Chemical Corporation, Morgantown Operations, Morgantown, W. Va. Attention M. B. Wright, Manager Phone 3491.

The Company is a chemical plant manufacturing ammonia and other chemical products employing approximately 1050. Approximately 234 employees are involved in this dispute.

The three unions jointly and the company have been attempting to renegotiate a contract expiring Feb. 10, 1954. A number of items have been agreed upon. A number of items including a wage increase, certain additional fringe benefits, and other proposed contractual clauses are in dispute.

Both parties have reached a point where agreement

appears impossible. A strike has been threatened any time after midnite Feb. 10, 1954. To avoid this it is imperative that as soon as possible, mediation and conciliation machinery be used in an attempt to reconcile the differences.

This notice is being filed on behalf of all parties listed below.

Mathieson Chemical Corp., Morgantown Operation

M. B. WRIGHT

International Brotherhood of Electrical Workers Local 425

W. A. BERRY

United Brotherhood of Carpenters and Joiners of America Local 1369

C. B. SMYTH

United Assoc of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry Local 152

T. L. RADFORD

G. C. Exhibit 11

March 15, 1954

Mr. Thurmon L. Radford
Business Agent
United Association of Journeymen &
Apprentices of the Plumbing & Pipe
Fitting Industry of the United
States and Canada
Local Union No. 152
231 Chestnut Street
Morgantown, West Virginia

Dear Sir:

You will be interested in knowing that on Wednesday, March 17, 1954, the Company will start to interview applicants for some of the jobs which were formerly filled by striking employees. This is information which I felt is in your interest to know.

Yours very truly,

(s) M. B. WRIGHT
M. B. WRIGHT
Manager

MBW:bt

G. C. Exhibit 12

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA

LOCAL UNION 152, MORGANTOWN, W. VA.

March 23, 1954

231 Chestnut Street
Morgantown, West Virginia

Mathieson Chemical Corporation
P. O. Box 888
Morgantown, West Virginia

Gentlemen:

On March 15, 1954 I telephoned the Mathieson Chemical Corporation and requested that negotiation between the Mathieson Chemical Corporation and the 3 AFL Unions, which represent certain of the Company's employees, be resumed. After conferring with Mr. A. S. Gilliam and Mr. Kileen, Mr. Kileen advised me, in part, to relay my proposal of resuming negotiations to Mr. William Rose of the Federal Mediation and Conciliation Service.

On March 15, 1954 I contacted Mr. William Rose of the Federal Mediation and Conciliation Service, and advised him that it was the desire of the 3 AFL Unions to resume negotiations. I was informed by Mr. Rose that Mr. A. A. Ahner (a Company Representative) would not be available for a meeting with us during the week ending March 20, 1954.

We hereby offer to meet and confer with the Representatives of the Company for the purpose of negotiating further

on the unresolved issues and looking toward the fulfillment of our mutual obligation—the execution of a written agreement.

Sincerely yours,

THURMON L. RADFORD
Business Agent
Local Union No. 152

vr

Registered Mail — Return Receipt Requested

G. C. Exhibit 14

MATHIESON CHEMICAL CORPORATION

March 30, 1954

Registered Mail
Return Receipt Requested

Mr. Thurmon L. Radford
Business Agent
United Association of Journeymen &
Apprentices of the Plumbing & Pipe
Fitting Industry of the United
States and Canada
Local Union No. 152
231 Chestnut Street
Morgantown, West Virginia

Dear Sir:

This is in reply to your letter of March 23, 1954. We will meet with you at a time mutually convenient to consider such matters as may be germane. I would suggest

Friday, April 2, as a date for meeting provided this is agreeable to you and your committee.

Yours very truly,

(s) A. S. GILLIAM
A. S. GILLIAM
Asst. Manager

ASG:bt

G. C. Exhibit 15

ARTICLE IV, SEC. 5(a)

PAR. 2 OF 3 PAR.

Anything in this Article IV on seniority to the contrary notwithstanding, employees in the journeyman classification and employees in the Helper Classification within a Work Group covered by this Contract who were not at work from February 25, 1954, until at or after noon on March 17, 1954, shall be laid off before any employee so classified in the same Work Group who remained at or returned to work or was hired during the period from February 25, 1954, to noon March 17, 1954, is laid off.

G. C. Exhibit 17

MATHIESON CHEMICAL CORPORATION

April 27, 1954

Registered Mail
Return Receipt Requested

Mr. Thurmon L. Radford
Business Agent
United Association of Journeymen &
Apprentices of the Plumbing & Pipe
Fitting Industry of the United
States and Canada
Local Union No. 152
231 Chestnut Street
Morgantown, West Virginia

Dear Sir:

This is in reply to your letter of April 20, 1954.

As you know, we negotiated for several months regarding the renewal of the three A.F.L. contracts which expired simultaneously on February 10, 1954.

The only issue was a wage increase which we opposed. Your group went out on strike to enforce your demand for a wage increase.

We told you repeatedly in meetings before and during the strike, and in one meeting held after the strike, that there could be no wage increase granted this year, giving you our reasons therefor in detail many times.

As a result of the strike, certain new issues arose.

At the meeting after the strike on April 2, 1954, we stated the conditions under which we would sign an agreement and you said those conditions were totally unacceptable to you

and you could never agree to them. We stated that our offer would remain open for five days.

We next heard from you on April 15, asking for a meeting to discuss "the unresolved issues". We told you that we do not propose to sit in a series of futile meetings repeating our respective position and asked that you submit any new proposal in writing.

You have now done so. You still propose a wage increase, although we have told you in many meetings over a period of several months that we could not grant a wage increase. You totally ignore the new issues which arose as a result of the strike. Your position is utterly unrealistic. It illustrates the futility of further meetings on questions regarding which we are apparently hopelessly in opposition.

We are forced to reject the proposals contained in your letter of April 20. It is unnecessary to cite reasons which have been given to you so many times before.

We see nothing to be gained in a meeting such as you propose. You know our position too well to waste your time and ours in futile discussions of previously rejected proposals.

Yours very truly,

(s) M. B. WRIGHT
M. B. WRIGHT
Manager

MBW:bt

G. C. Exhibit 18

February 12, 1955

Registered Mail
Return Receipt Requested

Mr. Thurmon L. Radford
Business Agent
United Association of Journeymen &
Apprentices of the Plumbing & Pipe
Fitting Industry of the United
States and Canada
Local Union No. 152
231 Chestnut Street
Morgantown, West Virginia

Dear Sir:

We have not heard from you since we wrote you April 27, 1954. We now reinstate the proposal made by us in that letter and the proposal we made in our meeting with you on April 2, 1954, ammended, however, as follows: We propose to increase the straight time hourly wage rates for any employees which you may represent in the amount of 3¢ per hour effective February 13, 1955; provided we receive your concurrence. We will be glad to receive your concurrence in writing and if you prefer to confer with us, you may do so.

Awaiting your response.

Yours very truly,

(s) M. B. WRIGHT
M. B. WRIGHT
Manager

MBW:bt

G. C. Exhibit 21

February 21, 1955

Registered Mail
Return Receipt Requested

Mr. Thurmon L. Radford
Business Agent
United Association of Journeymen &
Apprentices of the Plumbing & Pipe
Fitting Industry of the
United States & Canada
Local Union No. 152
231 Chestnut Street
Morgantown, W. Va.

Dear Sir:

This will acknowledge the receipt of your letter of February 15, 1955, in which you advised us that, with certain provisions, you do now wish to confer with us.

We will confer with you on such matters as may be appropriate for bargaining. We suggest that the meeting be held at the office of the Morgantown plant of the Company at 10:30 A. M. on March 3, 1955. Let us know if the time and place are satisfactory.

Yours very truly,

(s) M. B. WRIGHT
M. B. WRIGHT
Manager

MBW:bt

G. C. Exhibit 23

LOCAL UNION 152, MORGANTOWN, W. VA.

March 14, 1955

231 Chestnut Street
Morgantown, West Virginia

Olin-Mathieson Chemical Corporation
P. O. Box 888
Morgantown, West Virginia

Gentlemen:

In accordance with the discussions that Representatives of United Association Local Union No. 152, I.B.E.W. Local Union No. 425, and Carpenters Local Union No. 1369 had with your Representatives on March 3, 1955, we herewith accept the entire proposals of your Company, unconditionally, which are as follows:

1. Increase of three cents ($.03) per hour for all employees represented by the above Local Unions.
2. All of the proposals which were tentatively agreed upon prior to the strike.
3. A One-Year Agreement.
4. Seniority Provision proposed by you on April 2, 1954, and against which an Unfair Labor Practice Charge is now pending before the National Labor Relations Board, will be held in abeyance until the Board renders its decision.

   If the Board determines that your proposed provision is legal, then the Contract will be amended to include it.

   If the Board determines that the provision is illegal

then the Seniority Provision of the last Contract shall be included in the present Contract by amendment.

If you will draft contracts and forward them to us, we will execute them.

Sincerely yours,

THURMON L. RADFORD
Business Agent
U. A. Local Union No. 152

vr

G. C. Exhibit 27

April 7, 1955

Registered Mail
Return Receipt Requested

Mr. Thomas X. Dunn
Suite 831 Tower Building
Washington 5, D. C.

Dear Mr. Dunn:

The proposal of the Company made to the three unions March 3, 1955, was carefully explained, and I believe you will recall having clarified the strike-seniority proposal for Mr. Radford during the meeting. In order that there would be no misunderstanding, we offered to furnish to the unions copies of all revised articles, and did so with certain exceptions at the meeting on March 3. The other revisions including the one on strike-seniority were sent to Mr. Radford following the meeting with our letter of March 3.

Mr. Radford advised us by letter dated March 14 that the three unions "unconditionally" accepted the proposal

made by the Company, and we forwarded to Mr. Radford 6 copies of each of the three contracts for execution as required by him. The Company, as we indicated in our letter of March 21, is ready and willing to execute the contracts sent the unions embodying the agreements reached by the parties' good faith in collective bargaining.

We had hoped to expedite contract execution by sending them all to Mr. Radford as he suggested, and we advised him that we would execute them for the Company upon their return, signed, to us.

We look forward to consumating the agreement reached by the Company and the three unions through executioin of the contracts sent Mr. Radford which embody that agreement.

Yours very truly,

M. B. WRIGHT
Manager

MBW:bt

Encs: Copy letter T. L. Radford to Olin Mathieson dated March 14

Copy letter M. B. Wright to T. L. Radford dated March 21

cc: Thurmon L. Radford

Exhibit R.1

March 3, 1955

Registered Mail
Return Receipt Requested

Mr. Thurmon L. Radford
Business Agent
United Association of Journeymen &
Apprentices of the Plumbing & Pipe
Fitting Industry of the United
States & Canada
Local Union No. 152
231 Chestnut Street
Morgantown, W. Va.

Dear Sir:

These are extra copies of items tentatively agreed to which we promised to send you in addition to the items given you today.

Article IV, you will note, incorporates the revision to Section 5 to reflect the proposal made by the Company during the April 2, 1954, meeting.

Yours very truly,

(s) A. S. GILLIAM
A. S. GILLIAM
Asst. Manager

ASG:bt
Attachments

G. C. Exhibit 4a

ARTICLE II

UNION SECURITY AND CHECKOFF

Section 1. (a) It is understood and agreed that for the duration of this Agreement all employees within the terms of this Agreement shall become and remain members in good standing of the UNION as a condition of employment by the COMPANY. All present employees covered by this Agreement shall, on the thirty-first day from the date of this Agreement, become members of the UNION and shall thereafter remain members of the UNION in good standing as a condition of employment by the COMPANY. All employees hired after the effective date of this Agreement shall, on the thirty-first day from the date of their employment, become and remain members in good standing as a condition of employment by the COMPANY.

(b) At the end of each week, the COMPANY will furnish to the designated representative of the UNION a list of the names, payroll numbers, and hiring dates of all new employees.

Section 2. The UNION reserves the right of disciplining its members for violation of its laws, rules and agreement.

Section 3. Provided each affected employee shall have signed an Authorization for Payroll Deduction and shall have filed a copy of the same with the COMPANY, the COMPANY shall check off, from its employees' wages, Union Initiation Fees and Monthly Dues. The amount of dues and initiation fees shall be certified to the COMPANY by the UNION on or before the 10th day of each month. The sum so collected shall be transmitted to the UNION

along with a statement showing the names and the amount so deducted from each employee on or before the last day of each month.

ARTICLE XVIII

DURATION CLAUSE

Section 1. This Agreement shall become effective as of February 10, 1953, and shall continue in full force and effect until February 10, 1954, and from year to year thereafter unless either party mails notice to the other by Registered Mail at least sixty (60) days prior to February 10, 1954, or any later anniversary date of the Agreement, as to its intention to modify or terminate the Agreement. Thereupon the parties shall initiate negotiation no later than thirty (30) days prior to the anniversary date.

Section 2. This Agreement shall be subject to amendment at any time only by mutual consent of the parties hereto. Such amendment shall be reduced to writing, state the effective date of the amendment, and be executed in the same manner as is the Agreement.

Exhibit R.4

[TR. PP. 5-6]

DUNN: I agree with all you've said. But I don't understand this. The thing that is sticking in the Union's craw is that you've changed the seniority provisions. To continue satisfactory relations the Company should concede as much as it can. The Union went out on an economic strike, however, no increase was given. It seems as though your seniority proposal is punitive. You should withdraw it.

STULL: Our action was not punitive. I feel our action will not change the opinion of the men who share with us

the objective of keeping the plant running. In continuing the operation of this plant we had some help and we continued. We have an obligation to the people here as well as to the officers and stockholders. Any assistance we get is of paramount importance. We should be able to offer people stability. We have no antipathy towards anyone. Our action affected Union members both plus and minus. Some who were active in the Union were benifitted and some who were not active were hurt. The effect is only on layoffs, nothing else. You have filed unfair labor charges. We think we are right and no doubt you think you are right. We'll let NLRB decide. Of course NLRB can't move until a General Counsel is approved by the Senate. This may be anytime, maybe next week, maybe longer.

LORING: Are we attempting to talk about our people who went on strike and then you are askeing us to agree to take punitive action against them?

BOARD'S DECISION AND ORDER

On June 17, 1955, Trial Examiner C. W. Whittemore issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter the Respondent filed exceptions to the Intermediate Report and a brief.[1] The

[1] The Respondent also filed a motion to incorporate into the record a posthearing contract made with one of the charging Unions, Carpenters. The General Counsel opposed the motion, on the ground that the alleged contract had no bearing on the issues. For the reasons set forth in *N. L. R. B.* v. *American National Insurance Company*, 343 U. S. 395, Footnote 4, and *Efco Manufacturing Company*, 108 NLRB 245, the motion is hereby denied.

Pipe Fitters also filed a brief.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs, and the entire record in these cases, and hereby adopts the findings, conclusions and recommendations of the Trial Examiner, with the modifications noted below.

1. Because the facts in these cases satisfy us that the Respondent's motivation was discriminatory, we agree with the Trial Examiner that the Respondent violated Section 8(a)(3) and (1) of the Act with respect to the major issue, the Respondent's new super-seniority policy. It is highly significant that not until the strike was over, and all the strikers had been put back to work, did the Respondent *for the first time* decide to separate its employees into two seniority groups for layoff purposes, depending on whether or not they had returned to work before the end of the strike. The Respondent does not claim and there is no suggestion in the record that, as an economic measure to get employees to work during the strike, it had promised them super-seniority. In fact, it does not appear that the matter of relative seniority was ever mentioned to any employees before the end of the strike. Nevertheless, in the ensuing economic layoff, the Respondent in effect dismissed the complainants because of their protected activity in remaining on strike until its termination, while retaining an equal number of other employees with less seniority because they had not remained on strike. It was stipulated that the complainants would not have been selected for layoff under the seniority system established pursuant to the old contracts,—the only layoff system shown by the record to be in effect at the Respondent's plant prior to the advent of super-seniority.

Moreover, it is clear that even under the new system the complainants would not have been laid off if they too had returned to work before the Unions called the strike off.

On these facts we are convinced, as was the Trial Examiner, that the Respondent's change of seniority policy and its consequent dismissal of the complainants were in fact motivated, not by any legitimate economic interest of its own, but by a desire to punish the complainants for exercising the right guaranteed in Section 7 to engage in concerted activities, and a wish to reward the other employees for abandoning or not participating in the strike. Whether the Respondent's unlawful actions are regarded as a discouragement of membership in the Unions which the employees had selected as their collective bargaining representatives, and thus a violation of Section 8(a)(3) of the Act, or as an infringement of the more general statutory right to engage in concerted activities for mutual aid or protection and thus a violation of Section 8(a)(1), we find that the remedy hereinafter ordered is necessary to effectuate the policies of the Act.[2]

2. The unlawful motivation underlying the Respondent's proposal and imposition of the super-seniority clause during the very time it was ostensibly bargaining with the Unions, clearly reveals also its bad faith in the contract negotiations themselves. As we have already found, the Respondent's discriminatory seniority policy was a retaliatory measure to

[2] In defense of its action the Respondent cites the case of *N.L.R.B.* v. *Potlatch Forests, Inc.*, 189 F. 2d 82, where the Ninth Circuit Court denied enforcement of an 8(a)(3) finding on somewhat similar facts. We have carefully considered the *Potlatch* decision and are of the unanimous opinion that it is distinguishable on its facts from the instant case. In any event, Acting Chairman Rodgers and Member Murdock are constrained, with due deference to that Court, to disagree with the decision to the extent that it may conflict with the present finding.

penalize its employees for having exercised their statutory rights. Its argument now, that the simultaneous attempt to cement that policy in a final contract reflected only a good faith desire to perpetuate its concept of economic justice, is hardly persuasive. Rather, the Respondent's invocation of the new seniority policy in the contract negotiations, and its insistence even a year later—although all other issues had been settled between them—that the Unions either accept the new policy or forego any contract at all, establish that it did not deal with the Unions in good faith, as under the Statute it was required to do. Indeed, in the circumstances of this case, the Respondent's insistence upon its seniority-clause demand satisfies us that throughout the bargaining period involved, its conduct towards the Unions was colored by a bad faith resolve never to come to terms on a written agreement. Viewed against this background, the Respondent's other responses to the Unions' attempts to continue the bargaining conferences gain added significance as also revealing an outright decision to refuse to bargain. Thus, on March 15, 1954, it rejected the Unions' request for a collective bargaining meeting with a statement that the Unions' proposal should be made through the Federal Mediation and Conciliation Service; on April 15, or 16, 1954, it turned down another bargaining request with the advice that the Unions' proposal be submitted in writing; and finally, on April 27, 1954, it refused still another invitation to bargain by simply saying that an impasse had been reached and that further negotiations would be futile.[3] On the foregoing facts, and on the entire record, we find, as did the Trial

[3] We do not adopt the Trial Examiner's finding that the Respondent's failure to reply to a bargaining request of the Unions dated March 23 also constituted an unlawful refusal to bargain. Instead, we find, as also appears in the Intermediate Report, that the Respondent did reply to this request on March 30.

Examiner, that the Respondent refused to bargain with the Unions, and thereby violated Section 8(a)(5) and (1) of the Act.

Order

Upon the entire record in these cases, and pursuant to Section 10(c) of the National Labor Relations Act as amended, the National Labor Relations Board hereby orders that the Respondent, Olin Mathieson Chemical Corporation, Morgantown, West Virginia, and its officers, agents, successors and assigns:

1. Cease and desist from:

(a) Discouraging membership in or lawful activities on behalf of United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 152, AFL; United Brotherhood of Carpenters and Joiners of America, Local 1369, AFL; International Brotherhood of Electrical Workers, Local 425, AFL; or any other labor organization, by laying off any of its employees or otherwise discriminating in regard to hire or tenure of employment or any term or condition of employment;

(b) Refusing to bargain collectively with any of the above-named labor organizations as the exclusive representative of all its employees in the respective unit herein found to be appropriate, with respect to rates of pay, wages, hours of work and other conditions of employment;

(c) In any other manner interfering with, restraining or coercing its employees in the exercise of the right to self-organization, to form or join labor organizations, to assist any of the above-named labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of col-

lective bargaining or other mutual aid or protection, and to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Offer to Robert Permar, Michael D. Eddy, Sr., Herman Morris, Francis Ruggerio, Wayne O. Mayfield, C. B. Smyth and Elwood Frum immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority or other rights and privileges, and make them whole in the manner set forth in the section of the Intermediate Report entitled "The remedy";

(b) Preserve and, upon request, make available to the Board or its agents for examination and copying, all payroll records, social-security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of back pay due under the terms of this Order;

(c) Rescind forthwith its discriminatory seniority policy announced on April 2, 1954, and effectuated on April 9, 1954, and restore all employees affected thereby to the seniority they would have enjoyed absent such discriminatory policy;

(d) Upon request, bargain collectively with each of the three above-named labor organizations as the exclusive representative of all the employees in the respective appropriate unit, and embody in a signed agreement any understanding reached;

(e) Post at its place of business in Morgantown, West

Virginia, copies of the notice attached to the Intermediate Report as an Appendix.[4] Copies of said notice, to be furnished by the Regional Director for the Sixth Region, shall, after being duly signed by the Respondent, be posted by it immediately upon receipt thereof and maintained by it for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that the said notices are not altered, defaced, or covered by any other material;

(f) Notify the Regional Director for the Sixth Region in writing, within ten (10) days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated, Washington, D. C., October 18, 1955.

Philip Ray Rodgers, Acting Chairman
Abe Murdock, Member
Boyd Leedom, Member

[SEAL] NATIONAL LABOR RELATIONS BOARD

INTERMEDIATE REPORT

Statement of the Case

This proceeding, brought under Section 10(b) of the National Labor Relations Act, as amended, 61 Stat. 136, herein called the Act, was heard before the undersigned Trial Examiner at Morgantown, West Virginia, on May 16

[4] The notice shall be amended, however, by substituting for the words *"The Recommendations of a Trial Examiner"* in the caption thereof the words *"A Decision and Order."* In the event that this Order is enforced by a decree of the United States Court of Appeals, the notice shall be further amended by inserting before the words *"A Decision and Order"* the words *"A Decree of the United States Court of Appeals Enforcing an Order."*

and 17, 1955, pursuant to due notice to all parties. All parties were represented at the hearing, and were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence relevant and material to the issues, to argue orally upon the record, and to file briefs and proposed findings. General Counsel engaged in oral argument, the Respondent and the Pipe Fitters filed briefs.

The consolidated complaint, issued by the General Counsel of the National Labor Relations Board, the latter herein called the Board, alleges in substance that the above-named Respondents: (1) since on or about March 15, 1954, have refused to bargain in good faith with the above-named labor organizations as exclusive bargaining representatives of employees in certain appropriate units; (2) on April 2, 1954, discriminatorily altered its previous seniority policy to discourage membership in and activities on behalf of the said labor organizations; (3) on April 9, pursuant to said seniority policy discriminatorily laid off seven named employees and since then has refused to reinstate them; and (4) by such conduct has interfered with, restrained, and coerced employees in the exercise of rights guaranteed by Section 7 of the Act. In its duly filed answer the Respondent denied the commission of the alleged unfair labor practices.

Upon the entire record in the case and from his observation of the witnesses, the Trial Examiner makes the following:

Findings of Fact

I. The business of the Respondent

Olin Mathieson Chemical Corporation is a Virginia corporation engaged in the manufacture, sale, and distribution of ammonia, methyl alcohol, hexamine, and coke oven by-products in several States of the United States, having its

principal office in Baltimore, Maryland. On or about August 31, 1954, as the result of a corporate merger, the business of Mathieson Chemical Corporation and its Morgantown, West Virginia, plant, the only facility here involved, was continued under the name and style of Olin Mathieson Chemical Corporation. Mathieson Chemical was a Virginia corporation also, with a principal office in Baltimore, Maryland, and with plants and places of business in various States, including the Morgantown plant, where it was engaged in the production and sale of the above-described products.

During the 6-month period before August 31, 1954, the latter corporation made, sold, and shipped products valued at more than $1,000,000, of which amount more than 90 percent was shipped from Morgantown to points outside the State of West Virginia, and during the same period it purchased raw and other materials for use at its Morgantown plant valued at more than $1,000,000, of which about 30 percent came from points outside West Virginia. During the 6-month period between September 1954 and March 1955, Olin Mathieson made, sold and shipped products, and purchased raw materials in value and percentages in interstate commerce as above-described for Mathieson Chemical. The Respondent, the term hereinafter used to cover both corporations, stipulated at the hearing that it was engaged in commerce within the meaning of the Act, and that the Board has jurisdiction. It is so found.

III. THE UNFAIR LABOR PRACTICES

A. *The issues*

The major issues arise from the employer's decision, made during or soon after an economic strike, and as expressed by the testimony of Plant Manager M. B. Wright, to "re-

tain[ed] in the work group" with seniority over strikers all employees who did not strike or who returned to work during the strike. Specific acts claimed by General Counsel as violative of the Act were in implementation of this decision, and consist especially of: (1) a proposal made on April 2, 1954, and at all times thereafter insisted upon by the employer, that new contracts being negotiated must include a clause granting "super-seniority" to "any employee . . . who remained at or returned to work . . . during the period from February 25, 1954, to noon March 17, 1954"—the full term of the strike above referred to, and (2) the unilateral effectuation of that policy by actually laying off in accordance with its provisions certain employees who took part in the strike and failed to return until it was called off.

The complaint also claims, as additional items of refusal to bargain in good faith, that the Respondent engaged in "dilatory and delaying" negotiating tactics, and that it refused to discuss any issues between April 27, 1954, and March 3, 1955.

In the two succeeding sections will be set forth: (1) the relevant facts; and (2) the opposing contentions of the parties and the Trial Examiner's conclusions.

B. *The facts*

In 1952, following Board-conducted elections,[1] the three labor organizations here involved as charging parties were duly certified[2] as the exclusive bargaining representatives for certain groups of maintenance employees, as follows:

---

[1] The Board's Decisions, Orders, and Direction of Elections are set out in *Mathieson Chemical Corporation*, 100 NLRB 1028 and 101 NLRB 274.

[2] The certifications were stipulated by the parties in these proceedings.

United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 152, A.F.L., (herein called the Pipe Fitters) for the units found appropriate by the Board:

> All pipefitters and helpers, excluding all other employees and supervisors. All welders and helpers, excluding all other employees and supervisors. All instrument repairmen and helpers, excluding all other employees and supervisors.

United Brotherhood of Carpenters and Joiners of America, Local 1369, A.F.L., (herein called the Carpenters) for the units found appropriate by the Board:

> All machinists, bench mechanics and helpers, excluding all other employees and supervisors. All millwrights and helpers, excluding all other employees and supervisors. All material fabricators and helpers, excluding all other employees and supervisors. All carpenters and helpers, excluding all other employees and supervisors.

International Brotherhood of Electrical Workers, Local 425, A.F.L., (herein called the Electrical Workers) for the unit found appropriate by the Board:

> All electricians and helpers, excluding all other employees and supervisors.

Following the certifications and negotiations, the Respondent entered into contracts with the three craft unions. All three contracts were to expire on February 10, 1954. In November 1953, the unions formally notified the employer, in accordance with terms of the existing agreements, that they desired to negotiate certain modifications. In December the employer acknowledged the request and, in its turn, expressed a desire to modify the contracts. Negotiations began on or about January 10, 1954. Thurman L. Radford,

business representative for the Pipe Fitters, served as spokesman for the craft unions.

Between January 10 and February 10 — when the contracts were to expire — about a dozen meetings were held. No full agreement was reached, although it appears that there was give and take on both sides. On February 10 representatives of the three unions and the employer sent a joint telegram to the Federal Mediation and Conciliation Service. Relevant excerpts from that wire are:

> The three unions jointly and the company have been attempting to renegotiate a contract expiring Feb. 10, 1954. A number of items have been agreed upon. A number of items including a wage increase, certain additional fringe benefits, and other proposed contractual clauses are in dispute.
>
> Both parties have reached a point where agreement appears impossible. A strike has been threatened any time after midnite Feb. 10, 1954. To avoid this it is imperative that as soon as possible, mediation and concilliation (sic) machinery be used in attempt to reconcile the differences.[3]

Mediation officials attended subsequent meetings. On February 17 the unions withdrew some of their proposals but, particularly as to wages, no agreement was reached. On February 24 the strike began. General Counsel concedes that the strike was economic in nature. On March 15, Plant Manager Wright sent Radford the following letter:

> You will be interested in knowing that on Wednesday, March 17, 1954, the Company will start to interview applicants for some of the jobs which were formerly

[3] The same wire also pointed out the "the 60 day notice required by law" had been filed by the unions.

filled by striking employees. This is information which I felt is in your interest to know.

Upon receipt of this letter Radford promptly telephoned to Thomas Kileen, the company attorney and negotiator, and asked for a negotiation meeting. Kileen replied that if Radford had any proposals to make he should make them through the Mediation Service. Radford thereupon called a Mediation official, reported Kileen's communication, and asked him to arrange a meeting. This official told Radford that A. A. Ahner, assistant to the president of the Respondent, would not be available for a meeting for a week. About the same time Radford was approached by James Coon, head of the local Chamber of Commerce and of a citizens' committee, who offered services to obtain peaceful labor relations at the Respondent's plant. Radford responded that the best thing he and his committee could do would be to arrange for the resumption of negotiations between the company and the unions. Later Coon communciated with Radford, and asked him, "If this citizens' committee would request you to return the striking employees to work at the plant, and negotiations would be resumed, and you return them to work under the terms of the old agreement, would you be agreeable?"

Radford agreed to this proposal, the strike was terminated, and the strikers returned to work at noon on March 17.

Whatever the basis for Coon's assurance to Radford that negotiations would resume,[4] none were immediately held. On March 23, Radford sent the following communication to the company:

[4] The complaint does not claim, nor is any finding made, that the "citizens' committee" was an instrument of the Respondent.

> On March 15, 1954, I telephoned the Mathieson Chemical Corporation and requested that negotiation between the Mathieson Chemical Corporation and the 3 AFL Unions, which represent certain of the Company's employees, be resumed. After conferring with Mr. A. S. Gilliam and Mr. Kileen, Mr. Kileen advised me, in part, to relay my proposal of resuming negotiations to Mr. William Rose of the Federal Mediation and Conciliation Service.
>
> On March 15, 1954 I contacted Mr. William Rose of the Federal Mediation and Conciliation Service, and advised him that it was the desire of the 3 AFL Unions to resume negotiations. I was informed by Mr. Rose that Mr. A. A. Ahner (a Company Representative) would not be available for a meeting with us during the week ending March 20, 1954.
>
> We hereby offer to meet and confer with the Representatives of the Company for the purpose of negotiating further on the unresolved issues and looking toward the fulfillment of our mutual obligation — the execution of a written agreement.

Although this letter was sent by registered mail, the Respondent did not reply to it. On March 29, Radford again wrote to the Respondent, pointing out that he had not received a reply to his previous letter, quoting from it, again seeking meetings, and concluding:

> I had hoped that directing the striking employees, of the 3 AFL Local Unions, to return to work, without any agreement whatsoever, would demonstrate to the Company and the Public our sincere desire to resolve the issues between the Company and our Unions.
>
> If the Mathieson Chemical Corporation continues to refuse to bargain in good faith by ignoring our repeated efforts to resolve our differences, the alternatives which we may pursue are very limited.

This letter was also published in the local newspaper.

On March 30, Assistant Manager A. S. Gilliam, of the Respondent, replied as follows:

> This is in reply to your letter of March 23, 1954. We will meet with you at a time mutually convenient to consider such matters as may be germane. I would suggest Friday, April 2, as a date for a meeting provided this is agreeable to you and your committee.

A meeting was held on April 2. At this meeting the employer offered to sign contracts with the three unions containing all provisions previously agreed to *except* that the seniority clauses must include the following addition:

> Anything in this Article IV on seniority to the contrary notwithstanding, employees in the journeymen classification and employees in the Helper Classification within a Work Group covered by this Contract who were not at work from February 25, 1954, until at or after noon on March 17, 1954, shall be laid off before any employee so classified in the same Work Group who remained at or returned to work or was hired during the period from February 25, 1954, to noon March 17, 1954, is laid off.

At the same time the Respondent informed the union representatives that it intended to lay off 94 employees in the maintenance department the following week, on April 9, and that the super-seniority policy contained in the above proposal would be used in selecting individuals for the layoff.

The unions flatly rejected the proposal and protested against the announced statement of layoff policy.

Despite the union's unequivocal rejection of this seniority policy, on April 9 the Respondent proceeded with the layoff

in accordance with it. The seven individuals here involved, who were laid off on April 9 out of their regular seniority order while others of lesser seniority were retained, are as follows:

Robert Permar	Francis Ruggerio
Michael D. Eddy, Sr.	Wayne O. Mayfield
Herman Morris	C. B. Smyth

Elwood Frum[5]

Employees retained, while the above-named were let go, were employees who had either returned to work during the strike or who did not strike.

None of the seven above-named employees has been recalled to work. (This finding is a reasonable inference drawn from the facts: (1) that the Respondent offered no evidence to refute the allegation of the complaint that since April 9, 1954, the said employees have been refused reinstatement, and (2) the testimony of Plant Manager Wright to the effect that up to the time of the hearing and since the layoff of April 9, 1954, with the exception of recalling two welders unidentified and apparently not here involved there has been no change in the size of the maintenance groups employed.)

On April 15 or 16, Radford telephoned to Kileen, seeking a negotiating meeting, but was informed that the company did not wish to meet with the unions, and that if he had any proposals to make they should be submitted in writing.

On April 20, Radford wrote to the Respondent, stating in part:

---

[5] It was stipulated at the hearing by the parties that the above-identified employees were thus laid off. Since no evidence was offered, and the Respondent does not claim, that any *new* employees were hired as replacements during the strike, that issue clearly is not before the Trial Examiner, and will not be discussed herein.

> On April 16, 1954, I telephoned the Mathieson Chemical Corporation and requested of Mr. T. E. Kileen a negotiation session between the Mathieson Chemical Corporation and the 3 AFL Unions which represent certain of the Company's employees.
>
> Mr. Kileen stated that the Company did not wish to meet and suggested that we submit our proposals in writing. Since, apparently, we have no other alternative, we are submitting, in part, our proposals. In doing so, we would like to point out that this is a very impractical method of resolving the many issues that remain unresolved.

The letter then outlined certain union proposals, including a reduced wage demand, and repeated its request for a meeting with employer representatives.

On April 27, Wright replied as follows — the text of his letter being quoted in full:

> This is in reply to your letter of April 20, 1954.
>
> As you know, we negotiated for several months regarding the renewal of the three A.F.L. contracts which expired simultaneously on February 10, 1954.
>
> The only issue was a wage increase which we opposed. Your group went out on strike to enforce your demand for a wage increase.
>
> We told you repeatedly in meetings before and during the strike, and in one meeting held after the strike, that there could be no wage increase granted this year, giving you our reasons therefor in detail many times.
>
> As a result of the strike, certain new issues arose.
>
> At the meeting after the strike on April 2, 1954, we stated the conditions under which we would sign an agreement and you said those conditions were totally unacceptable to you and you could never agree to them.

> We stated that our offer would remain open for five days.
>
> We next heard from you on April 15, asking for a meeting to discuss "the unresolved issues." We told you that we do not propose to sit in a series of futile meetings repeating our respective position and asked that you submit any new proposal in writing.
>
> You have now done so. You still propose a wage increase, although we have told you in many meetings over a period of several months that we could not grant a wage increase. You totally ignore the new issues which arose as a result of the strike. Your position is utterly unrealistic. It illustrates the futility of further meetings on questions regarding which we are apparently hopelessly in opposition.
>
> We are forced to reject the proposals contained in your letter of April 20. It is unnecessary to cite reasons which have been given to you so many times before.
>
> We see nothing to be gained in a meeting such as you propose. You know our position too well to waste your time and ours in futile discussions of previously rejected proposals.

Radford took this letter as a refusal to meet, and shortly thereafter, on June 7, all three A.F.L. unions filed charges against the Respondent with the Board, claiming violations of the Act by refusing to bargain and by discriminating against strikers.

After thus replying, on April 27, 1954, to the unions' request to meet, the Respondent did not communicate with Radford again until February 12, 1955, when Wright wrote to him as follows:

> We have not heard from you since we wrote you April 27, 1954. We now reinstate the proposal made by us in that letter and the proposal we made in our meeting

> with you on April 2, 1954, ammended (sic), however, as follows: We propose to increase the straight time hourly wage rates for any employees which may represent in the amount of 3¢ per hour effective February 13, 1955; provided we receive your concurrence. We will be glad to receive your concurrence in writing and if you prefer to confer with us, you may do so.

On February 15, Radford replied, pointing out that the company, in its letter of April 27, 1954, above quoted, had refused to meet as requested, and that a number of unresolved issues had then been pending, and agreeing to meet on any day set by the company.

The parties met on March 3, 1955. Representatives of the three unions, including Radford, were present. No witness at the hearing testified fully as to his recollection of all discussions at this meeting. Copious notes taken by Industrial Relations Manager W. T. Webb were received in evidence. It appears unnecessary here to attempt complete reconstruction of this negotiating meeting, since there is no apparent dispute as to understandings reached except as to a single matter — that of actual inclusion in written agreements of the new seniority policy unilaterally put into effect by the company on April 2, 1954. In substance, the testimony and Webb's notes show that agreement was reached, or discussions dropped, on all points except that of seniority. As to the "super-seniority" amendment, quoted heretofore, it appears from cross-examination of Radford by counsel for the Respondent, that the latter sought to establish that the unions, on March 3, actually agreed to permit inclusion of the disputed clause in written agreements. Not only did Radford stoutly and credibly deny having made such an agreement, but the apparent claim is not supported by testimony on the part of Respondent's witnesses, nor by Webb's

notes. In any event, as the exchange of later correspondence shows — which is quoted below — the unions made it unequivocally plain to the company, *before* the written agreements were submitted for signature, that it would not accept a contract containing a clause which it was claiming, before the Board, to be illegal.

On March 14, Radford wrote to the Respondent as follows:

> In accordance with the discussions that Representatives of United Association Local Union No. 152, I.B.E.W. Local Union No. 425, and Carpenters Local Union No. 1369 had with your Representatives on March 3, 1955, we herewith accept the entire proposals of hour Company, unconditionally, which are as follows:
>
> 1. Increase of three cents ($.03) per hour for all employees represented by the above Local Unions.
> 2. All of the proposals which were tentatively agreed upon prior to the strike.
> 3. A One-Year Agreement.
> 4. Seniority Provision proposed by you on April 2, 1954, and against which an Unfair Labor Practice Charge is now pending before the National Labor Relations Board, will be held in abeyance until the Board renders its decision.
>
>   If the Board determines that your proposed provision is legal, then the Contract will be amended to include it.
>
>   If the Board determines that the provision is illegal then the Seniority Provision of the last Contract shall be included in the present Contract by amendment.

> If you will draft contracts and forward them to us, we will execute them.

Despite Radford's above-quoted written statement of his understanding that the controversial seniority clause was to be "held in abeyance until the Board renders its decision," Wright on March 21 sent to the unions written agreements for signature which contained the seniority clause, and accompanied the contracts with a covering letter which said, in part:

> In accordance with your letter of March 14, in which you advise that United Association Local Union No. 152, IBEW Local Union No. 425, and Carpenters Local Union No. 1369, have unconditionally accepted the entire proposals made on March 3, 1955, by the company to the representatives of these three unions in a negotiating session held at Morgantown, we are sending you enclosed herewith copies of agreements between the company and each of the unions for execution by the unions and return to us.

Wright in the same letter called particular attention to the disputed seniority clause. In view of the apparent position taken by counsel for the Respondent during the hearing, as to agreement reached on March 3, it is noteworthy that Wright makes no such claim in his letter. As to the seniority clause he says: "Pending final adjudication of the strike-seniority issue raised by the three local unions, we, on March 3, 1955, *proposed* that the strike-seniority provision above referred to would remain unchanged, but that if final adjudication of the strike issue were adverse to the company, the second paragraph of Article IV, Section 5(a) would, in accordance with such decision, be deleted from the contract." (Italics added.)

On March 30, 1955, Attorney Thomas X. Dunn for the Pipe Fitters, who had been present at the March 3 meeting, replied to Wright's above-quoted letter as follows:

> As counsel for the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada and Local Union 152, it was not my understanding that the strike seniority provision (Art. IV, Section 5-A) would be included in a new agreement, pending a determination of the legality of that provision by the National Labor Relations Board. The proposal was that if all other conditions were agreed upon, then the status of the strike seniority would be left for the Board.
>
> For these locals to agree to the insertion of the strike seniority provision in their contract at that time would obviously be placing them in the position of expressly agreeing that you could continue to commit an unfair labor practice while we are claiming the opposite before the Board. They, in effect, would be consenting to your illegal conduct and the question of waiver and estoppel could become an issue in the case where such does not exist at this time.
>
> There is no purpose, legally or factually, for your insistence that this provision remain in the contract, and when the writer appeared at the March 3, 1955 conference, he did so hoping that the parties, in good faith, could come to an understanding on all differences except the matter pending before the Board.
>
> It is apparent that you do not wish to deal with these local unions and particularly it is your wish that they not represent any men in your plant. We consider your conduct in refusing to execute a contract as further evidence of bad faith and refusal to bargain.
>
> Local 152 will not waive any of its rights in the case before the Board by executing an agreement with the strike seniority clause contained in it.

In the last piece of correspondence exchanged before the hearing to be introduced into evidence, Wright replied to Dunn's letter as follows, on April 7, 1955:

> The proposal of the Company made to the three unions March 3, 1955, was carefully explained, and I believe you will recall having clarified the strike-seniority proposal for Mr. Radford during the meeting. In order that there would be no misunderstanding, we offered to furnish to the unions copies of all revised articles, and did so with certain exceptions at the meeting on March 3. The other revisions including the one on strike-seniority were went to Mr. Radford following the meeting with our letter of March 3.
>
> Mr. Radford advised us by letter dated March 14 that the three unions "unconditionally" accepted the proposal made by the Company, and we forwarded to Mr. Radford 6 copies of each of the three contracts for execution as required by him. The Company, as we indicated in our letter of March 21, is ready and willing to execute the contracts sent the unions embodying the agreements reached by the parties' good faith in collective bargaining.
>
> We had hoped to expedite contract execution by sending them all to Mr. Radford as he suggested, and we advised him that we would execute them for the Company upon their return, signed, by us.
>
> We look forward to consumating the agreement reached by the Company and the three unions through execution of the contracts sent Mr. Radford which embody that agreement.

Before turning to resolution of the matters in legal dispute, it would be appropriate to resolve the apparent controversy as to facts, particularly as to whether or not there was: (1) agreement by the Union, on March 3 or there-

after, to permit inclusion of the company's seniority clause in the contract, or (2) agreement by the company to exclude it, as alleged by an amendment to the complaint at the hearing.

The Trial Examiner finds that *no* agreement was reached on this point. Careful reading of Webb's copious notes, which are in evidence, reveals only that the company attorney insisted that the clause be included and that Radford as stoutly objected. The testimony of Gilliam, a company representative present, further supports the finding that no agreement was reached, as shown by the following excerpts:

> (Gilliam) . . . Mr. Dunn expressed to Mr. Radford at that time thinks Mr. Stull has made it clear, amounts to having it in the contract, or leaving it up to the Board; then the Board will determine.
>
> Q. Did that satisfy Mr. Radford, as you recall?
> A. It didn't appear to. . . .
>
> * * *
>
> A. The last reference to seniority, as I recall it — and I am refreshing my mind from my notes — was near the end of the meeting when Mr. Dunn inquired about the seniority clause, and suggested that if the locals here, if they withdrew the no-strike issue, would it then be enough to change the company's mind on seniority by withdrawing our position on this and put the old seniority back, at which Mr. Stull replied, "No, we aren't withdrawing anything. . . ."

Nor do Wright's two letters, of March 21 and April 7, quoted above, warrant belief that he considered that any such agreement to include the clause had been reached on March 3. In both letters he refers only to what he claims was unconditional acceptance on *March 14*, in Radford's

letter of that date, of the proposals made by the company on March 3. Radford's letter is not ambiguous. Its language plainly transmits the message that the Unions were unconditionally accepting the proposal that the disputed clause be *kept out* of any signed agreement unless and until it should be found legal by the Board. For whatever reason, Wright chose to lift the words "unconditional" and "accept" from their context.

Whether Radford's recollection was correct or not, to the effect that on March 3 the company agreed to hold the seniority clause in abeyance, it is clear that no agreement was ever reached by the parties to include it in the contract until its legality had been passed upon by the Board. On the other hand, Radford's testimony as to his recollection lacks support in that of employee Heldreth, also present at the March 3 meeting. The Trial Examiner believes the evidence insufficient to establish clearly that on that date the company agreed to hold the clause in abeyance.

C. *Conclusions*

No evidence to the contrary having been offered by the Respondent, and all testimony on the point indicating that at all times material the parties have been negotiating on that basis, it is concluded and found that: (1) the units described in Section III B above are appropriate for the purposes of collective bargaining within the meaning of Section 9 of the Act; (2) since October 6 and December 9, 1952, the respective labor organizations involved herein have been and now are the exclusive bargaining representatives of the employees in said units; and (3) since on or before March 15, 1954, and at all times thereafter, said labor organizations have sought to bargain collectively with the Respondent.

As noted heretofore, the major issue for determination here is whether or not, under the Act, the Respondent's imposition and effectuation of the new seniority policy were unfair labor practices.

It has been found above that on April 2, 1954, during negotiations, the employer announced the new policy and proposed that the unions agree to it, and that on April 9 despite the union's flat objections the employer laid off employees in accordance with it. Just what is the nature of that policy? It gave returning strikers employment rights of value greater than they had earned by mere length of service with the company. Wright's testimony makes it plain that it was given, as a reward, to employees abandoning the strike or not going on strike. He said: ". . . we owed these men an obligation for as much job security as possible." There being no evidence to the contrary, it is reasonably inferred that the employer assumed this "obligation" voluntarily, without request from anyone, and without necessity. Indeed, in his brief counsel for the Respondent says: "the necessity for protecting Company's business was not mentioned." No claim was advanced that the "obligation" was assumed in order to get replacements during the strike,—*new* employees in contradistinction to employees on strike. It was a gift, in short, to employees who had abandoned their right to engage in protected concerted activities. But it was not a gift, or reward, coming out of the employer's pocket. Until a layoff occurred, it could be of value only as psychological "job security"—mental assurance that the recipient would be among the last to go, no matter how long he had worked for the company. When the "obligation" was satisfied and the so-called debt paid, its substance came out of the very employment tenure of fellow-employees, as actually happened on April 9. Men with longer

service were let go. Thus the discrimination, both in latent policy and overt application, was real and not incidental. The returning striker could not benefit, in terms of employment, except at the expense of the striker who chose to exercise his legal right. In short, the nature of the policy was such that the reward could not be paid one except by simultaneously punishing another. The same coin, with two sides, taken from one employee's pocket and given to another.

Had the Respondent merely *offered* such an inducement to its employees while they were on strike, its act would have been found violative of the Act by the Board, in accordance with its decision in *Dinion Coil Co., Inc.* (110 NLRB No. 27). There the Board found that during a similar economic strike occurring during negotiations the employer "bypassed the Union, and tended to undermine its prestige as the employees' exclusive representative" by threatening to withdraw, among other things, "seniority credits."

In his able brief, counsel for the Respondent appears to rely mainly upon the contention that "There is here no evidence of discrimination nor of any purpose or attempt to discourage union membership," and upon the decision of the U. S. Court of Appeals, Ninth Circuit, in *Potlatch Forests, Inc.* (189 F. 2d 82) which set aside 87 NLRB 1193, quoting from that court decision:

> So far as Sec. 8(a)(3) is concerned, Potlatch may adopt any rule of seniority it desires—whether or not that rule violates an existing agreement—so long as that rule does not discourage union membership by discrimination.

Counsel failed to quote the following, however, from the same decision:

> In the instant case, therefore, the "discrimination" between replacements and strikers is not an unfair labor practice despite a tendency to discourage union activities, because the benefit conferred upon the replacements is a benefit reasonably appropriate for the employer to confer in attempting "to protect and continue his business by supplying places left vacant by strikers."

As noted heretofore, the Respondent makes no claim that the reward to returning strikers in this case was to "protect or continue" the business. It appears to the Trial Examiner that on this point, as well as others pointed out by General Counsel in his argument, and by counsel for the Pipe Fitters in his brief, this case is distinguishable from Potlatch.

It has been found that the new policy was discriminatory in favor of employees leaving the strike and against those who remained on strike until called off. It has also been found, on the basis of Wright's testimony as well as the plain facts of the labor dispute, that the motive for inaugurating and applying the new policy was to reward employees who abandoned the strike and to punish those who had remained on strike. The Board and the courts have long held at it is common knowledge that a strike called by the bargaining representative of employees is (barring certain types of strikes not involved here) "concerted activities" within the meaning of Section 7 of the Act and an activity within the scope of participating "membership in any labor organization." The strike which is here involved was a "union activity" which members were called upon to perform in an effort to pressure the employer to yield to the economic demands of the employees' legal bargaining representative. It reasonably follows that any discrimination in favor of employees who ceased this union activity and against those who continued it could have had no other

effect than to discourage union membership to the extent that it warned all employees, upon penalty of like treatment, that they must not in the future exercise the strike privilege of such membership. That no member of management admitted as a witness that the Respondent acted with the intent of discouraging union membership is not a critical flaw in General Counsel's proof. The Supreme Court of the United States said in *Radio Officers' Union, et al.*, (347 U. S. 17); (33 LRRM at p. 2428).

> Both the Board and the courts have recognized that proof of certain types of discrimination satisfies the intent requirement. This recognition that specific proof of intent is unnecessary where employer conduct inherently encourages or discourages union membership is but an application of the common law rule that a man is held to intend the foreseeable consequences of his conduct.

The Trial Examiner concludes and finds that both the announcement of the unilateral policy, and its application, were discriminatory and designed to discourage membership in the unions involved, and thus were violative of Section 8(a)(3) of the Act.

It appears unnecessary here to pass upon a question which the parties, during negotiations, expressed some wish to have the Board decide—whether, *per se*, the discriminatory seniority policy was illegal. In passing, however, it may be well to draw the attention of both the Board and the parties to *Minneapolis Star and Tribune Company* (109 NLRB No. 109) where the Board majority found that both the employer and the union violated the Act, not only by exercising, but also by entering into a contract which permitted the *union* to put at the bottom of the usual seniority list an employee who declined to *participate* in strike activities.

Since discrimination is the act to be guarded against, and it makes little difference to the employee whether it is the union or the employer who initiates the discrimination against him, it would appear that the rule should likewise frown upon any agreement permitting an *employer* to discriminate against employees who *participate* in a strike.

It has been found above that, pursuant to the new seniority policy, the following individuals were laid off on April 9, 1954, while others of lesser seniority were retained:

Robert Permar	Francis Ruggerio
Michael D. Eddy, Sr.	Wayne O. Mayfield
Herman Morris	C. B. Smyth

Elwood Frum

Having concluded that the policy invoked was violative of the Act, the Trial Examiner concludes and finds that the individuals named above were laid off discriminatorily, in order to discourage union membership and activity, in violation of Section 8(a)(3) of the Act.

Turning now to the no less important question as to whether the unilateral application by the Respondent of its new seniority policy and its insistence that it be included in any signed agreement constituted a refusal to bargain, within the meaning of Section 8(a)(5) of the Act. In his brief, counsel for the Respondent contends: ". . . refusal to bargain cannot be sustained on the basis of one parties' (sic) insistence on a proposal any more than upon the other parties' rejection of it." He cites no authority for such a broad contention and the Trial Examiner know of none. The Board has repeatedly found that a very real distinction exists between merely proposing, or urging, a point being negotiated, and insisting upon it to the point of forcing the other party to accept or forego any contract. (For cases in which proposals fell short of ultimate insistence, see *Solar*

Aircraft Company, 109 NLRB No. 22, and *United States Gypsum Company*, 109 NLRB No. 159. For cases in which proposals became "a condition precedent to an agreement," see *I.B.S. Manufacturing Company*, 96 NLRB at 1269, *Pecheur Lozenge Co., Inc.*, 98 NLRB at 497, and *Stylecraft Furniture Co.*, 111 NLRB No. 151.)

Since it has been found as a fact, in the preceding section, that the Respondent has made acceptance of its proposal "a condition precedent to an agreement," from April 2, 1954, to the time of the hearing, the Trial Examiner concludes and finds that this conduct was a clear refusal to bargain in violation of Section 8(a)(5) of the Act. It follows and is likewise found that the Respondent violated the same section on April 9, 1954, when it unilaterally put into effect, during the course of negotiations and over the unions' objections, a policy which it could not legally insist that the unions agree to include in a contract. This is so, whether or not the policy was of itself discriminatory and illegal.

As to remaining issues raised by the complaint, General Counsel urges that the Respondent failed to bargain in good faith by following conduct, found above to have occurred: (1) Kileen's insistence on March 15, 1954, that Radford make any further negotiating proposals through the Federal Mediation Service; (2) the company's failure to reply to Radford's letter of March 23, which again requested a meeting; (3) Kileen's rejection on April 16 of Radford's telephonic request to meet and his instruction that any proposals be submitted in writing; and (4) the company's letter of April 27, which effectively cut off further negotiations for nearly a year. The Trial Examiner concludes that General Counsel's contentions have merit. As to points (1), (2) and (3), it would appear that ample support of General Counsel's position is to be found in the following quotation

from the Fifth Circuit, U. S. Court of Appeals, decision in *U. S. Cold Storage Corp.*, 32 LRRM at 2027, and cases therein cited:

> Section 8(d) of the Act defines "collective bargaining" as the "obligation of the employer and the representatives of the employees to meet at reasonable times and confer in good faith." This statutory obligation is not satisfied by merely inviting the union to submit any proposition they have to make in writing where either party seeks a personal conference.

And in a more recent case, *Beasley Mills* (111 NLRB No. 137), the Board has found similarly dilatory and evasive tactics to be violative of Section 8(a)(5) of the Act.

And as to point (4), the language of Wright's letter of April 27, 1954, could hardly have been reasonably interpreted by Radford as other than a clear refusal to meet and negotiate. It has been quoted in full above. In it Wright acknowledges the request to meet, rejects the written proposals flatly, and closes with the firm declaration that management sees "nothing to be gained in a meeting." It was hardly incumbent upon the unions to make further efforts to meet, having been twice, within a period of 2 weeks, refused an audience. It would appear that they pursued the appropriate course provided by the Act, and filed charges with the Board. This plain refusal on the part of the Respondent to carry out its obligations as defined by the Act was in violation of Section 8(a)(5) of the Act.

In conclusion, it is further found that by the aforesaid conduct by the Respondent in violation of Section 8(a)(3) and (5) of the Act, it interfered with, restrained, and coerced employees in the exercise of rights guaranteed by Section 7 of the Act, and thereby violated Section 8(a)(1) of the Act.

IV. The effect of the unfair labor practices upon commerce

The activities of the Respondent, set forth in Section III, above, occurring in connection with the operations of the Respondent described in Section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The remedy

Having found that the Respondent has engaged in certain unfair labor practices affecting commerce, the Trial Examiner will recommend that it cease and desist therefrom and take affirmative action designed to effectuate the policies of the Act.

It has been found that the Respondent discriminatorily laid off seven employees on April 9, 1954, and has denied reinstatement to them, and that such discrimination has been pursuant to its discriminatory seniority policy put into effect on the same date. It will be recommended that the Respondent forthwith rescind said seniority policy and unconditionally offer the said seven employees immediate and full reinstatement to their former or substantially equivalent positions without prejudice to seniority and other rights and privileges. It will also be recommended that the Respondent make whole the same employees for any loss of pay they may have suffered by reason of the discrimination against them, by payment to each of them of a sum of money equal to the amount he would normally have earned from April 9, 1954, to the date of offer of reinstatement, less his net earnings during that period. The amount of back pay due shall be computed according to Board policy set forth in *F. W.*

Woolworth Company, 90 NLRB 289. Payroll and other records in possession of the Respondent are to be made available to the Board, or its agents, to assist in such computation.

It will be further recommended that the Respondent bargain in good faith with the unions here involved, upon request, and that it not insist, as a condition of executing any agreements, upon the discriminatory seniority policy herein described.

Upon the basis of the foregoing findings of fact and upon the entire record in the case, the Trial Examiner makes the following:

Conclusions of Law

1. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 152, A.F.L.; United Brotherhood of Carpenters and Joiners of America, Local 1369, A.F.L.; and International Brotherhood of Electrical Workers, Local 425, A.F.L., are labor organizations within the meaning of Section 2(5) of the Act.

2. Since October 6, 1952, said labor organization of Pipe Fitters has been and now is the exclusive representative of all employees in the following appropriate units for the purposes of collective bargaining within the meaning of Section 9(a) of the Act:

> All pipe fitters and helpers, excluding all other employees and supervisors. All welders and helpers, excluding all other employees and supervisors. All instrument repairmen and helpers, excluding all other employees and supervisors.

3. Since October 6, 1952, said labor organization of Carpenters has been and now is the exclusive representative of all employees in the following appropriate units for the pur-

pose of collective bargaining within the meaning of Section 9(a) of the Act:

> All machinists, bench mechanics and helpers, excluding all other employees and supervisors. All millwrights and helpers, excluding all other employees and supervisors.

And since December 9, 1952, said labor organization has similarly been the exclusive bargaining representative of all employees in the following units:

> All material fabricators and helpers, excluding all other employees and supervisors. All carpenters and helpers, excluding all other employees and supervisors.

4. Since October 6, 1952, said labor organization of Electrical Workers has been and now is the exclusive representative of all employees in the following appropriate unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act:

> All electricians and helpers, excluding all other employees and supervisors.

5. By refusing on and after March 16, 1954, to bargain collectively with the aforesaid labor organizations as the exclusive representative of the employees in the appropriate units the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By discriminating in regard to the hire and tenure of employment, and conditions of employment, of employees Robert Permar, Michael D. Eddy, Sr., Herman Morris, Francis Ruggerio, Wayne O. Mayfield, C. B. Smyth, and Edwood Frum, thereby discouraging membership in the aforesaid labor organizations, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

7. By interfering with, restraining, and coercing employees in the exercise of rights guaranteed in Section 7 of the Act, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

8. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Recommendations

Upon the basis of the foregoing findings of fact and conclusions of law and upon the entire record in the case, the Trial Examiner recommends that Olin Mathieson Chemical Corporation, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in or activities on behalf of United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 152, A.F.L., United Brotherhood of Carpenters and Joiners of America, Local 1369, A.F.L., and International Brotherhood of Electrical Workers, Local 425, A.F.L., or in any other labor organization, by discriminatorily laying off or denying reinstatement, or by discriminating in any other manner in regard to hire and tenure of employment or any terms or conditions of employment;

(b) Refusing to bargain collectively with the above-named labor organizations as the exclusive representative of all employees in the respective units herein found to be appropriate, with respect to rates of pay, wages, hours of work, and other conditions of employment;

(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form or join labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection as guaranteed in Section 7 of the Act, or to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act.

2. Take the following affirmative action, which the Trial Examiner finds will effectuate the policies of the Act:

(a) Offer to Robert Permar, Michael D. Eddy, Sr., Herman Morris, Francis Ruggerio, Wayne O. Mayfield, C. B. Smyth, and Elwood Frum immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges.

(b) Make whole the aforesaid employees for any loss of pay they may have suffered by reason of the Respondent's discrimination against them, in the manner set forth above in the section entitled "The remedy";

(c) Upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, time cards, personnel records and reports, and all records necessary to determine the amounts of back pay due;

(d) Rescind forthwith its discriminatory seniority policy announced on April 2, 1954, and effectuated on April 9, 1954, and restore all employees affected thereby to the seniority they would have enjoyed absent such discriminatory policy;

(e) Upon request, bargain collectively in good faith with the three above-named labor organizations, as the exclusive representatives of employees in the units as above described, with respect to their rates of pay, wages, hours of work, and other conditions of employment, and embody in signed agreements any understanding reached;

(f) Post at its place of business in Morgantown, West Virginia, copies of the notice attached hereto as Appendix. Copies of the notice, to be furnished by the Regional Director for the Sixth Region, shall, after being duly signed by the Respondent's representative, be posted by the Respondent immediately upon receipt thereof, and maintained by it for a period of sixty (60) days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director for the Sixth Region, in writing, within twenty (20) days from the date of the service of this Intermediate Report, what steps the Respondent has taken to comply therewith.

It is further recommended that, unless within twenty (20) days from the date of the service of this Intermediate Report the Respondent notifies said Regional Director that it will comply with the foregoing recommendations, the Board issue an order requiring the respondent to take the aforesaid action.

Dated at Washington, D. C., this ..... day of June 1955.

(s) C. W. WHITTEMORE
C. W. WHITTEMORE
Trial Examiner

Appendix

NOTICE TO ALL EMPLOYEES

PURSUANT TO THE RECOMMENDATIONS OF A TRIAL EXAMINER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We will not discourage membership in *United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 152, A. F. L., United Brotherhood of Carpenters and Joiners of America, Local 1369, A. F. L., International Brotherhood of Electrical Workers, Local 425, A. F. L.*, or in any other labor organization of our employees, by discharging, laying off, or refusing to reinstate any of our employees or by discriminating in any other manner in regard to their hire and tenure of employment or any term or condition of employment.

We will not insist, as a condition of executing any agreements with the above-named labor organizations that they include provisions granting discriminatory seniority privileges to employees who did not exercise, or ceased exercising, their right under the Act to engage in concerted activities, during the February-March 1954, strike.

We will not, in any manner, interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form, join, or assist the above-named or any other labor organization, to bargain collectively

through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act.

We will bargain collectively, upon request, with the three above-named labor organizations, as the exclusive representatives of employees in the respective appropriate units set forth below, with respect to grievances, labor disputes, wages, rates of pay, hours of employment and other conditions of employment, and if an understanding is reached, embody such understanding in signed agreements.

> All pipe fitters and helpers, excluding all other employees and supervisors. All welders and helpers, excluding all other employees and supervisors. All instrument repairmen and helpers, excluding all other employees and supervisors.
>
> All machinists, bench mechanics and helpers, excluding all other employees and supervisors. All millwrights and helpers, excluding all other employees and supervisors. All material fabricators and helpers, excluding all other employees and supervisors. All carpenters and helpers, excluding all other employees and supervisors.
>
> All electricians and helpers, excluding all other employees and supervisors.

We will offer the following named employees immediate and full reinstatement to their former or substantially equivalent positions without prejudice to any sen-

iority or other rights and privileges previously enjoyed, and make them whole for any loss of pay suffered as a result of the discrimination against them:

Robert Permar	Francis Ruggerio
Michael D. Eddy, Sr.	Wayne O. Mayfield
Herman Morris	C. B. Smyth

Elwood Frum

We will rescind our policy of depriving participants in the strike of February-March 1954, of the seniority which they would have had but for such policy.

All our employees are free to become or remain members of the above-named or any other labor organization. We will not discriminate in regard to hire or tenure of employment against any employees because of membership in or activity on behalf of any such labor organization.

OLIN MATHIESON CHEMICAL CORPORATION
(Employer)

Dated ..... By .....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

MOTION OF RESPONDENT
(Filed July 18, 1955)

Comes now the Respondent and respectfully moves that, the Board accept into evidence as a part of the record in the above captioned case the executed contract currently in effect between the Respondent and the United Brotherhood of Carpenters and Joiners of America, Local 1369, A.F.L., one of the charging unions, along with the supplemental

agreement between the parties executed concurrently therewith and attached thereto, neither of which were available at the time the hearing in this matter was held in Morgantown, West Virginia, * * *

In support of this motion, Respondent submits that subsequent to the close of the hearing in this matter held in Morgantown, West Virginia on May 16 and 17, 1955, the Respondent continued negotiations with the United Brotherhood of Carpenters and Joiners of America, Local 1369, A.F.L. with respect to the matters still at issue between the parties at the time of the hearing at the request of the Carpenters Union (the only one of the charging unions which has requested further meetings following the collective bargaining session of March 3, 1955) and on June 22, 1955 entered into and executed a written contract with the Carpenters Union embodying all of the proposals made by the Respondent to all three of the charging unions at the March 3, 1955 meeting (as clarified and explained in Respondent's letters of March 21, 1955 to Radford (G. C. Ex. 25) and Respondent's letter of April 7, 1955 to Counsel Dunn (G. C. Ex. 27)) such contract being the same contract with the exception of:

1) Dates

2) The addition under Article XVIII of the following paragraph:

> Either party to this Agreement shall have the right to reopen for negotiation on the subject of wage rates only, all other items specifically excluded, on February 13, 1956, providing that the party so desiring to reopen notifies the other in writing by registered mail at least sixty (60) days in advance of such reopening date.

which was sent to the unions with Respondent's letter of March 21, 1955 (G. C. Ex. 25) and which proposed agree-

ment was introduced in evidence by General Counsel as General Counsel's Exhibit 24(b). Attached to the executed contract is a supplemental agreement dated June 22, 1955 relating to the seniority clause which reads as follows:

SUPPLEMENTAL AGREEMENT

The Olin Mathieson Chemical Corporation for its Morgantown, West Virginia, operations and the United Brotherhood of Carpenters and Joiners of America, Local 1369, AFL, have, concurrently herewith, executed a labor contract effective the 22 day of June, 1955, with the understanding and mutual agreement that, pending final adjudication of the strike-seniority issue with respect to which charges have been filed with and hearings held by the National Labor Relations Board, the labor contract effective the 22 day of June, 1955, reflects the complete agreement between the parties, but, in the event that final adjudication of the strike-seniority issue is adverse to the Company, then the second paragraph of Article IV, Section 5(a) will, in accordance with such decision and with the provisions of Article XVII of the contract, be deleted and the contract in all other respects shall remain in full force and effect for the duration thereof.

Executed this 22 day of June, 1955.

OLIN MATHIESON CHEMICAL CORPORATION
Morgantown, West Virginia
by (s) M. B. Wright
Manager

LOCAL UNION NO. 1369 OF THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, A.F.L.
By (s) C. L. Canterbury
President
By (s) Carl B. Mercer
By (s) James E. Williams

The charging union executing this Agreement represented Michael D. Eddy, Wayne O. Mayfield, Herman Morris and C. V. Smith, four of the individuals named in the complaint, none of whom testified for the Board or the charging unions at the hearing.

INDEX

Page

Trial Examiner, C. W. Wittemore, Esq.

Appearances: For the General Counsel, Joseph C. Thackery, Esq., Attorney, 2107 Clark Building, Pittsburg, Pa.; C. W. Ahner, Esq., Ambassador Bldg., St. Louis, Mo., on behalf of Mathieson Chemical Corporation, the Respondent; Francis X. Ward, Esq., General Counsel, 222 East Michigan Street, Indianapolis, Ind., on behalf of United Brotherhood of Carpenters and Joiners of America, Local 1369, AFL, Charging Union; Mr. Thermon L. Radford, 231 Chestnut Street, Morgantown, W. Va., on behalf of United Assn. of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 152, AFL, and International Brotherhood of Electrical Workers, Local 425, AFL, Charging Union 1-2

Proceedings:

Witnesses on behalf of the General Counsel:

Thurmon L. Radford

Direct Examination 2

Cross Examination 4

Willis Heldreth

Direct Examination 7

A. S. Gilliam

Direct Examination 9

Cross-Examination 9

M. Birney Wright

Direct Examination 9

Cross-Examination 10

General Counsel's Exhibit No. 4-A

Agreement between Mathieson Chem. Corp., Morgantown, W. Va. and United Assn. of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada..... 11

Article IV—Seniority..... 11

General Counsel's Exhibit No. 16..... 15

General Counsel's Exhibit No. 20..... 16

General Counsel's Exhibit No. 24-a..... 17

Respondent's Exhibit No. 4..... 22

Respondent's Exception No. 7..... 23

[1] BEFORE THE NATIONAL LABOR RELATIONS BOARD

SIXTH REGION

Case Nos. 6-CA-835, 6-CA-836, 6-CA-837

Mathieson Chemical Corporation and/or
Olin Mathieson Chemical Corporation,

and

United Association of Journeymen and Apprentices
of the Plumbing and Pipe Fitting Industry of the
United States and Canada, Local 152, AFL

and

United Brotherhood of Carpenters and
Joiners of America, Local 1369, AFL,

and

International Brotherhood of Electrical Workers,
Local 425, AFL.

Council Chambers, City Hall
Morgantown, West Virginia
Monday, May 16, 1955

Pursuant to notice, the above entitled matter came on for hearing at 9:30 a. m.

Before:

C. W. Whittemore, Esq., Trial Examiner.

Appearances:

Joseph C. Thackery, Esq., Attorney, 2107 Clark Building, Pittsburgh 22, Pennsylvania, appearing on behalf of the General Counsel.

[1(a)] *H. Webster Stull, Esq.*, 1501 Ambassador Building, St. Louis, Missouri, and

C. W. Ahner, Esq., 1023 Ambassador Building, St. Louis, Missouri, appearing on behalf of Mathieson Chemical Corporation, the Respondent.

Francis X. Ward, Esq., General Counsel, 222 East Michigan Street, Indianapolis, Indiana, appearing on behalf of United Brotherhood of Carpenters and Joiners of America, Local 1369, AFL, Charging Union.

Mr. Thermon L. Radford, 231 Chestnut Street, Morgantown, West Virginia, appearing on behalf of United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 152, AFL, and International Brotherhood of Electrical Workers, Local 425, AFL, Charging Unions.

[3] PROCEEDINGS

* * * * * * *

[38] THURMON L. RADFORD

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q. (By Mr. Thackery)

* * * * * * *

Q. You are business representative of Local 152 of the Pipe Fitters?

* * * * * * *

Q. Have you, within the last several years, represented your union in negotiations with Mathieson and Olin? A. I have.

* * * * * * *

[40] Q. (By Mr. Thackery) Did you at any time during the course of the negotiations represent any other unions, Mr. Radford? A. Yes, sir. Prior to beginning negotiations with the Mathieson Chemical Corporation we held a joint committee meeting between the three AF of L unions that represented certain of the employees, certain maintenance employees of the Mathieson Chemical Corporation, and I was chosen as the spokesman for the three unions, and by the "three unions" I mean the IBEW, Local [41] 425, and the Carpenters.

* * * * * * *

[49] Q. (By Mr. Thackery) I show you General Counsel's Exhibit 11 for identification, and ask you what that is. A. It is a copy of a letter sent from the Mathieson Chemical Corporation to me under date of March 15, 1954, advising me that the company would start to interview applicants for some of the jobs which were formerly filled by striking employees.

Q. Is that a copy, or is it the letter sent to you? A. This is the one that I received in the mail, in the mail.

Q. What did you do about that letter, if anything, Mr. Radford? A. I called the company and attempted to arrange a negotiation session with them.

Q. Whom did you talk to when you called the company? A. I think I first spoke with Mr. Gilliam, who referred me to Mr. Kileen.

Q. Did you talk to Mr. Kileen? A. I did.

Q. What did Mr. Kileen say? A. He said that if we had any proposals to make, to make them through the Federal Mediation and Conciliation Service.

(Mr. Thackery) Will the company stipulate that Thomas Kileen was the company attorney and negotiator at the times material herein for the company?

[50] (Mr. Stull) We will stipulate he was a company negotiator and attorney.

Q. (By Mr. Thackery) What did you do about that, Mr. Radford? A. I contacted Mr. Rose of the Federal Mediation and Conciliation Service, and advised him of the position the company had taken, and requested that he arrange a meeting.

Q. What happened about that, if anything? A. As I recall it, he advised me that Mr. Ahner—that is, this Mr. Ahner's father here—there were two involved—

Q. You will have to identify whom you are talking about. A. Mister—I think his initials are A. H. Ahner.

(Mr. Ahner) A. A. Ahner.

(The Witness) A. A. Ahner, Sr., whom I believe to be assistant to the president of the Mathieson Chemical Corporation, and he advised me he wasn't available for a meeting for a week.

Q. (By Mr. Thackery) Who advised you of that? A. Mr. Rose advised me that Mr. Ahner wasn't available for a meeting.

• • • • • • •

[56] Q. (By Mr. Thackery) I show you General Counsel's Exhibit 15 for identification and ask you what that is A. It is a copy of the seniority proposal of the company, which was made April 2, 1954, at that meeting.

• • • • • • •

[58] Q. If you know, Mr. Radford, were the production people laid off pursuant to this senority provision? A. No, sir. They were not. As a matter of fact, the company announced in the newspaper that they intended to lay our people off in accordance with this policy, and that they intended to lay off the District 50 people who represented the Production Workers; that they intended to lay them off strictly in accordance with the seniority provisions of their agreement which did not contain any such provision as this.

Q. Are you referring to employees represented by another union? A. Yes, sir.

• • • • • • •

[71] CROSS EXAMINATION

Q. (By Mr. Stull)

• • • • • • •

Q. Yes, there were. You testified with respect to the meeting [72] held on March 3rd, this year, at the company offices at the plant. At that time, Mr. Radford—the time of that meeting—was the proposal of the company clear to you? A. I can best answer your question by describing the meeting, if that is what you want me to do.

Q. Had you any—in order to save time here—had you any questions concerning the position of the company that remained unanswered at that meeting? A. At the outset of the meeting we asked you, or Mr. Dunn,—Thomas Dunn, our attorney—told you that he was appearing in behalf of our International and our local union, and that his purpose in doing so was in order that we did not prejudice our

rights in any manner whatsoever before the National Labor Relations Board in connection with charges that we had filed, and then we asked the company for their position, and the company outlined their position, after which I made certain proposals to the company, and then we took a recess, and during the time of that meeting you stated—you were at this particular meeting and were the principal spokesman for the company—I point that out because in the previous meetings Mr. Kileen had been principal spokesman for the company—and the question of the super-seniority or strike seniority for these employees were discussed at some length, and you said we had taken the case to the proper tribunal, that you people were willing to let the chips fall where they may, and with respect to [73] that particular provision.

We took your position to mean that you would leave the matter of the strike seniority clause to be adjudicated by the National Labor Relations Board, and it wouldn't necessarily, wouldn't be contained in any agreement we might reach with you, and that is a substantial factor, contributing factor, to why we notified you that we had agreed to these other items that had been in discussion, such as wages and hours.

Q. It was clear to you, wasn't it, Mr. Radford, that the company's proposal, as contained or as presented to you at the meeting of March 3rd, was that we enter into a contract embodying all of the changes that had been tentatively agreed upon during negotiations the previous year, with the exception of the seniority clause which would be as proposed by the company on April 2nd, at the meeting we had with you, and with the further exception of the wage schedules which would be revised upward to reflect a three-cent an hour increase for all employees in the bargaining units that you were discussing, was that not clear? A. Your question is quite lengthy. The answer is no in respect to the super-seniority. The proposal of the company—as I recall it,—with respect to the wages, was that you would increase the existing hourly wage rate three cents an hour. You would agree to the embodiment of all of the clauses which we had tentatively agreed upon prior to the strike,

and that we had [74] taken—you offered a one-year or a two-year agreement, whichever the unions preferred, and you stated that we had taken the super-seniority problem to the proper tribunal, and that you were willing to take your chances before the National Labor Relations Board in that respect and let the chips fall where they may.

• • • • • •

[78] Q. (By Mr. Stull) Did you get a letter from the company dated March 3rd, Mr. Radford? A. I think I did, yes.

Q. Would you recognize the copies of the proposals that were supplied to you at the conclusion of the March 3rd meeting, that we had available? A. That were supplied to me at the conclusion of the meeting?

Q. Yes. A. Almost at the outset of the meeting you stated there has been a lot of water gone over the dam since we met last, and that several proposals that the union had had, we had agreed upon prior to the strike, "we will provide you with copies of those agreements", and you did provide us with copies, if that's what you are getting at.

Q. And in addition to those we said there were some we were not in a position— A. You didn't have copies.

Q. Didn't have copies completed, but we would send them to you? A. That is correct.

Q. And did we send them to you? [79] A. Yes, sir. You sent some material to me.

Q. Yes. A. And included therein—as I recall it—was the super-seniority proposal of the company.

Q. That was with the letter of March 3rd? A. I think the letter was dated the same day we had our meeting at the plant, and I received it the next day, if I recall.

• • • • • •

[80] (Mr. Stull) May I ask these be marked for identification Respondent's exhibits.

(Thereupon, the documents above referred to were marked Respondent's Exhibits 1(a), (b) and (c) for identification.)

Q. (By Mr. Stull) I show you three papers which are

ditto copies, contract provisions, marked Exhibits 1(a), 1(b) and 1(c), and ask you if you recognize those as the enclosures which you received with the March 3rd letter, 1955? A. They may very well be the enclosures. I can't answer your question positively without checking over that to see what was contained in it. I have them over there.

Q. You have the ones you did receive? A. Yes.

Q. Subject to examination— A. I did receive this letter and I did receive some enclosures. Whether or not these are the specific ones,—there was quite a stack of them—whether or not these were the specific ones, I wouldn't know without checking.

(Trial Examiner) So we can dispose of the matter, if there be any objections, why don't you permit him to go to his bag and check it, and then you will know, yourself.

We will take a five-minute recess.

(Recess.)

[81] (Trial Examiner) On the record.

Q. (By Mr. Stull) Are you able to identify those three exhibits marked for identification as Respondent's Exhibit 1(a), 1(b) and 1(c), as having been received by you either at the meeting on March 3rd or with the letter the company sent you on March 3rd? A. I can.

* * * * * *

[104] WILLIS HELDRETH

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q. (By Mr. Thackery)

* * * * * *

Q. Where are you employed, Mr. Heldreth? A. Mathieson Chemical.

Q. What is your job there? A. Electrician.

Q. Do you belong to any union? A. I belong to IBE of IBEW, Local 425.

[105] Q. Are you an officer of that union? A. I was a steward. I guess I still hold that office.

Q. Directing your attention, Mr. Heldreth, to April 2, 1954, did you attend a collective bargaining meeting with the company? A. Yes, sir.

Q. Do you know to what I refer when I speak of the so-called super-seniority clause? A. Yes, I do.

Q. Can you tell me whether or not that clause was proposed at that meeting? A. The company proposed that.

Q. And what else happened to the clause, if you remember? A. We rejected the super-seniority clause. We didn't want no part of it.

Q. Do you remember who was the spokesman for the company? A. Yes, Mr. Kileen.

Q. Did he say anything about the seniority clause? A. Yes, he said that he felt that the ones that come across the picket line, and so forth, deserved a little—well, you might say a little something for helping support the breaking the strike.

• • • • • •

[106] Q. Directing your attention to the date of March 3rd, 1955, Mr. Heldreth, did you attend another meeting with the company? A. Yes, sir.

Q. Was Mr. Radford, who previously testified in this proceeding, present at that meeting? A. Yes, he was.

Q. Can you tell me whether or not the so-called super-seniority proposal was again discussed at that meeting? A. Yes, it was discussed at length.

Q. What was the provision of the unions with respect to that super-seniority clause at the March 3rd meeting? A. It was definitely out.

Q. The clause was out, is that your testimony? A. We wouldn't agree with that, wouldn't agree to nothing like that.

• • • • • •

[137] A. S. GILLIAM

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q. (By Mr. Stull) Mr. Gilliam, where are you employed? A. Olin Mathieson Chemical Corporation, Morgantown, West Virginia.

Q. How long have you been so employed? A. Three and one half years.

Q. In what capacity are you employed? A. Assistant Manager.

Q. Assistant Manager of the Morgantown operations? A. Right.

Q. Mr. Gilliam, did you attend, in your capacity as assistant manager, any of the negotiation meetings with the unions involved in these proceedings? A. I did.

Q. Did you attend a meeting held on March 3, 1955? A. I did.

• • • • • •

[149] CROSS EXAMINATION

Q. (By Mr. Thackery)

• • • • • •

[150] Q. Do you recall the following statements, and I quote from Respondent's Exhibit 4, statements by the parties at the meeting: Loring—strike that. "Radford:—No, that isn't it. I want to know if we have to agree on superseniority before agreeing on anything else. Stull: "No." Do you recall those statements? A. I recall a statement that Mr. Radford made, asking "if we insist on the clause as a condition of the agreement, would you reach an agreement without the clause?", to which Mr. Stull replied no, he thought he had made it clear.

• • • • • •

[151] M. BIRNEY WRIGHT

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q. (By Mr. Stull) Mr. Wright, where are you employed?

A. Employed by Olin Mathieson Chemical Corporation, Morgantown, West Virginia.

Q. In what capacity, Mr. Wright? A. As plant manager of the Morgantown operation.

• • • • • •

[158] CROSS EXAMINATION

Q. (By Mr. Thackery)

• • • • • •

[162] Q. Are you familiar with the fact that the so-called super-seniority proposal was given to the union on April 2nd? A. Yes.

Q. You knew that? A. I was told.

Q. You were told? A. Yes, sir.

Q. Did you take any action pursuant to that? A. In making up the list of people to be laid off, and working with the staff, those men were omitted from the layoff, those were made up from the proper people in the plant.

Q. When did you make that list up? A. In all probability it was studied, tentatively made up, a few days prior to March the 29th.

Q. March 29th? A. March 29th. Remember, that was not final.

Q. Is that 1954? A. 1954.

• • • • • •

GENERAL COUNSEL'S EXHIBIT No. 4-A

AGREEMENT

Between

Mathieson Chemical Corporation
Morgantown Operations
Morgantown, West Virginia

and

United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada

A. F. L.

Local Union No. 152

* * * * * *

ARTICLE IV

SENIORITY

Section 1. Seniority, as used herein, is defined as the right accruing to employees through length of service which entitles them to certain preferences as stated in this Agreement.

Section 2. (a) Seniority accrued by each employee shall be of two types, Plant Seniority and Work Group Seniority.

(b) The Plant Seniority of each employee who has completed his sixty (60) day probationary period shall be measured by the years, months, and days from the date of his last employment by the COMPANY at this Plant. The probationary period cannot be extended or renewed.

(c) There shall be three Work Groups applicable to all employees covered by this Agreement, namely:

Instrument Mechanics and helpers
Pipefitters and helpers
Welders and helpers

Work Group Seniority shall be based on the employee's period of service in his particular Work Group, starting with the first day that he is permanently assigned to a job

classification in the particular Work Group, and calculated in the same manner as Plant Seniority in (b) above.

Section 3. (a) When a vacancy occurs in one of the journeyman classifications in a Work Group, such vacancy shall be filled by a qualified employee from within that Work Group.

(b) An employee's qualifications for such vacancy shall be based on skill and ability. When skill and ability are equal, Work Group Seniority shall govern.

(c) Employees in lower job classifications shall be given the first opportunity to fill vacancies in higher job classifications through standard tests and determinations of skill and ability. The UNION shall have the opportunity of participating in such determinations.

Section 4. (a) In determining length of continuous service, no deduction shall be made for any lost time due to non-occupational injury or illness which does not exceed six (6) months. At the end of such six (6) month period, the employee shall not accrue additional seniority, but shall retain his accumulated seniority for a period not to exceed one (1) year.

(b) Any employees covered by this Agreement who incurs a compensable injury or disease while on duty shall continue to accumulate seniority for a period not to exceed one (1) year while absent for such reason. If the employee does not then return to work he shall cease to accumulate seniority but shall retain his accumulated seniority for a period not to exceed two (2) years.

(c) An employee, who returns to work within the periods specified in (a) and (b), hereof, after an absence due to a non-occupational or compensable injury or disease, shall be reinstated to his former position with full seniority right, provided that:

He is physically and mentally qualified to do the work, and that his job has not been abolished in the meantime or filled by an employee of greater seniority.

Said physical and mental qualifications shall be determined by the plant physician. If the decision of the plant

physician is not satisfactory to the employee, he may request an examination by a licensed physician who must be mutually agreed upon by the COMPANY, Employee, and UNION, and the decision of such physician shall be final. All expenses in connection with such requested examinations shall be borne by the COMPANY. The COMPANY will attempt to find suitable work, if available, for any such employee who is unable to return to his former position.

(d) The re-employment of employees who enter the Armed Services, either by draft or enlistment, shall be governed by the provisions of the Selective Service Act as amended or by such other than current statutory enactment controlling military veterans re-employments rights.

Section 5. (a) Reduction in force shall take place from the journeyman classifications and the helper classification. Layoffs from the journeyman classifications will be governed by Work Group Seniority regardless of the employees' job classification. Layoffs from the helper classification will be governed by Work Group Seniority. When Work Group Seniority is equal, Plant Seniority shall govern.

If the operation of this seniority clause tends to eliminate skills which would be required in the efficient operation of the Plant, the UNION will work out with the COMPANY a program which will permit the retention of skills necessary to continued efficient operation of the Plant.

(b) A disabled employee shall not be subject to layoff within the first six (6) months of disability or until such time as the plant physician certifies that the employee is able to return to active duty, whichever is earlier. Such employees will be expected to co-operate with the physician in following such advice and directions as may be given. If the employee's seniority at the time of a reduction in force is such that he would be subject to layoff, he shall not continue to accrue seniority after the date of reduction in force.

Section 6. (a) When adding to the force, employees released in accordance with Section 5 will be recalled in the reverse order in which they were laid off, and their seniority shall be restored to the status as of the date of layoff, ex-

cept that no employee who has been laid off for a period of more than one (1) year shall have a right to reinstatement.

(b) Employees being recalled shall be notified by Registered Mail, Return Receipt Requested, mailed to the last address on record in the COMPANY'S files. It shall be the duty of the employee to keep the COMPANY properly advised of his correct address.

(c) If an employee does not notify the COMPANY within forty-eight (48) hours after receiving his notice to return to work that he intends to return to work within ten (10) calendar days from receipt of notice, or if he does not report for work within five (5) calendar days after receipt of notice, the COMPANY may then fill the job for which he was recalled.

(d) An employee who fails to notify the COMPANY or fails to return to work as provided in (c) above, may retain his standing on the recall list if he personally reports to the COMPANY within thirty (30) days from the date of recall and advises the COMPANY of his desire to retain his standing on the list. An employee cannot exercise this privilege on more than one occasion.

Section 7. (a) Employees who voluntarily quit or who are discharged for just cause shall forfeit all seniority rights.

(b) Employees who have been laid off and are not reinstated within one (1) year following date of layoff shall forfeit all seniority rights.

(c) Employees who lose their seniority rights shall be considered as new employees if again employed by the COMPANY.

Section 8. Any employee promoted to a supervisory position, as defined in the Labor-Management Relations Act, shall not accumulate seniority during the time he is acting as a Supervisor, but such employee shall not lose accumulated seniority accrued at the time of his promotion for a period of one (1) year from the date of assumption of such supervisory duties.

Section 9. The COMPANY agrees to compile and furnish semi-annually to the UNION a seniority list showing the seniority of each employee covered by this Agreement.

• • • • • •

GENERAL COUNSEL'S EXHIBIT No. 16

UNITED ASSOCIATION

of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada

Suite 502 — Ring Building — Washington 6, D. C.

Local Union 152, City Morgantown, State W. Va.
Date April 20, 1954

231 Chestnut Street
Morgantown, West Virginia

Mathieson Chemical Corporation
P. O. Box 888
Morgantown, West Virginia
Gentlemen:

On April 16, 1954, I telephoned the Mathieson Chemical Corporation and requested of Mr. T. E. Kileen a negotiation session between the Mathieson Chemical Corporation and the 3 AFL Unions which represent certain of the Company's employees.

Mr. Kileen stated that the Company did not wish to meet and suggested that we submit our proposals in writing. Since, apparentley, we have no other alternative, we are submitting, in part, our proposals. In doing so, we would like to point out that this is a very impractical method of resolving the many issues that remain unresolved. These proposals are being submitted in behalf of U. A. Local Union No. 152, I. B E. W Local Union No. 425, and Carpenters Local Union No. 1369.

The 3 AFL Unions propose that the Company and the Union sign an Agreement which would continue in effect until February 10, 1955 and which would include all clauses tentatively agreed upon prior to the strike; and which would include all clauses appearing in the old Agreement, which expired February 10, 1954, over which there has been no

GENERAL COUNSEL'S EXHIBIT No. 20

UNITED ASSOCIATION

of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada

Suite 502 — Ring Building — Washington 6, D. C.

Local Union 152, City Morgantown, State W. Va.

Date February 15, 1955

231 Chestnut Street
Morgantown, West Virginia

Mr. M. B. Wright, Manager
Mathieson Chemical Corporation
Morgantown Plant
P. O. Box 888
Morgantown, West Virginia

Dear Sir:

We received your letter of February 12, 1955.

On behalf of United Association Local Union No. 152, I. B. E. W. Local Union No. 425, and Carpenters and Joiners Local Union No. 1369, please be advised that we are ready and willing (as we have been in the past) to enter into discussions on any and all matters which may lead to the consummation of a collective bargaining agreement between your Company and our Unions.

May we point out to you that in your letter of April 27, 1954, you refused to hold any further meetings with us. Among the many issues that had not been resolved at the time of your letter, of April 27, 1954, were such items as wages, fringe benefits, jurisdiction of work, elimination of "no-strike" clause, etc.

As a result of the discriminatory manner in which your Company laid off certain employees on April 9, 1954, certain new issues have arisen. We feel that the reinstatement with back pay of all employees who lost their jobs as a result of your Company's unilateral action in changing the seniority standing of employees is a proper subject for

discussion. We, also, feel that abandonment of your insistence upon a super-seniority arrangement for employees who crossed the picket line or remained at work during the strike is a proper subject for discussion.

GENERAL COUNSEL'S EXHIBIT No. 24-a

AGREEMENT

THIS AGREEMENT made and entered into as of the day of 1955, by and between OLIN MATHIESON CHEMICAL CORPORATION, for its Morgantown Operations, hereinafter referred to as the "COMPANY", and the UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL UNION No. 152, AFL, hereinafter referred to as the "UNION."

WITNESSETH:

It is mutually agreed as follows:

• • • • • •

ARTICLE IV

SENIORITY

Section 1. Seniority, as used herein, is defined as the right accruing to employees through length of service which entitles them to certain preferences as stated in this Agreement.

Section 2. (a) Seniority accrued by each employee shall be of two types, Plant Seniority and Work Group Seniority.

(b) The Plant Seniority of each employee who has completed his sixty (60) day probationary period shall be measured by the years, months, and days from the date of his last employment by the COMPANY at this plant. The probationary period cannot be extended or renewed.

(c) There shall be three Work Groups applicable to all employees covered by this Agreement, namely:

Instrument Mechanics and helpers
Pipefitters and helpers
Welders and helpers

Work Group Seniority shall be based on the employee's period of service in his particular Work Group, starting with the first day that he is permanently assigned to a job classification in the particular Work Group, and calculated in the same manner as Plant Seniority in (b) above.

Section 3. (a) When a vacancy occurs in Mechanic 1st Class or Mechanic 2nd Class classifications in a Work Group, such vacancy shall be filled by a qualified employee from within that Work Group provided that there is no one on layoff subject to recall to said Mechanic 1st Class or 2nd Class classifications in a Work Group.

It is understood that if there is anyone on layoff subject to recall that the provisions contained in Section 6(a) of this Article shall take effect before the provisions of this Section 3(a) take effect.

(b) An employee's qualifications for such vacancy shall be based on skill and ability. When skill and ability are equal, Work Group Seniority shall govern.

(c) Employees in lower job classifications shall be given the first opportunity to fill vacancies in higher job classifications through standard tests and determinations of skill and ability, provided that there is no one on layoff subject to recall to said higher job classifications. It is understood that if there is anyone on layoff subject to recall that the provisions contained in Section 6(a) of this Article shall take effect before the provisions of this Section 3(c) take effect. The UNION shall have the opportunity of participating in such determinations.

Section 4. (a) In determining length of continuous service, no deduction shall be made for any lost time due to non-occupational injury or illness which does not exceed six (6) months. At the end of such six (6) month period, the employee shall not accrue additional seniority, but shall retain his accumulated seniority for a period not to exceed one (1) year.

(b) Any employee covered by this Agreement who incurs a compensable injury or disease while on duty shall continue to accumulate seniority for a period not to exceed one (1) year while absent for such reason. If the employee does not then return to work he shall cease to accumulate seniority but shall retain his accumulated seniority for a period not to exceed two (2) years.

(c) An employee who returns to work within the periods specified in (a) and (b) hereof, after an absence due to a non-occupational or compensable injury or disease, shall be reinstated to his former position with full seniority right, provided that:

He is physically and mentally qualified to do the work, and that his job has not been abolished in the meantime or filled by an employee of greater seniority.

Said physical and mental qualifications shall be determined by the plant physician. If the decision of the plant physician is not satisfactory to the employee, he may request an examination by a licensed physician who must be mutually agreed upon by the COMPANY, Employee, and UNION, and the decision of such physician shall be final. All expenses in connection with such requested examinations shall be borne by the COMPANY. The COMPANY will attempt to find suitable work, if available, for any such employee who is unable to return to his former position.

(d) The re-employment of employees who enter the Armed Services, either by draft or enlistment, shall be governed by the provisions of the Selective Service Act as amended or by such other then current statutory enactment controlling military veterans re-employment rights.

Section 5. (a) Reduction in force shall take place from the Mechanics 1st and 2nd Class classifications, as one group, and the helper classification, as another group. Layoffs from the Mechanics 1st Class and Mechanics 2nd Class classifications will be governed by Work Group Seniority regardless of the employees' job classification. Layoffs from the helper classification will be governed by Work Group Seniority. When Work Group Seniority is equal, Plant Seniority shall govern.

Anything in this Article IV on seniority to the contrary notwithstanding, employees in the journeyman classification and employees in the helper classification within a Work Group covered by this Contract who were not at work from February 25, 1954, until, at or after noon on March 17, 1954, shall be laid off before any employee so classified in the same Work Group who remained at or returned to work or was hired during the period from February 25, 1954, to noon March 17, 1954, is laid off.

If the operation of this seniority clause tends to eliminate skills which would be required in the efficient operation of the Plant, the UNION will work out with the COMPANY a program which will permit the retention of skills necessary to continue efficient operations of the Plant.

(b) A disabled employee shall not be subject to layoff within the first six (6) months of disability or until such time as the plant physician certifies that the employee is able to return to active duty, whichever is earlier. Such employees will be expected to co-operate with the physician in following such advice and directions as may be given. If the employee's seniority at the time of a reduction in force is such that he would be subject to layoff, he shall not continue to accrue seniority after the date of reduction in force.

Section 6. (a) When adding to the force, or when filling vacancies, employees released in accordance with Section 5 will be recalled in the reverse order in which they were laid off, and their seniority shall be restored to the status as of the date of layoff, except that no employee who has been laid off for a period of more than one (1) year shall have a right to reinstatement.

(b) Employees being recalled shall be notified by Registered Mail, Return Receipt Requested, mailed to the last address on record in the COMPANY'S files. It shall be the duty of the employee to keep the COMPANY properly advised of his correct address.

(c) If an employee does not notify the COMPANY within forty-eight (48) hours after receiving his notice to return to work that he intends to return to work within ten (10)

calendar days from receipt of notice, or if he does not report for work within five (5) calendar days after receipt of notice, the COMPANY may then fill the job for which he was recalled.

(d) An employee who fails to notify the COMPANY or fails to return to work as provided in (c) above, may retain his standing on the recall list if he personally reports to the COMPANY within thirty (30) days from the date of recall and advises the COMPANY of his desire to retain his standing on the list. An employee cannot exercise this privilege on more than one occasion.

Section 7. (a) Employees who voluntarily quit or who are discharged for just cause shall forfeit all seniority rights.

(b) Employees who have been laid off and are not reinstated within one (1) year following date of layoff shall forfeit all seniority rights.

(c) Employees who lose their seniority rights shall be considered as new employees if again employed by the COMPANY.

Section 8. Any employee promoted to a supervisory position, as defined in the Labor-Management Relations Act, shall not accumulate seniority during the time he is acting as a Supervisor, but such employee shall not lose accumulated seniority accrued at the time of his promotion for a period of one (1) year from the date of assumption of such supervisory duties.

Section 9. The COMPANY agrees to compile and furnish semi-annually to the UNION a seniority list showing the seniority of each employee covered by this Agreement.

RESPONDENT'S EXHIBIT No. 4

Meeting With Representatives of AFL Unions

March 3, 1955

The meeting was called at 10:40 A. M.

Present Unions

United Association of Plumbers and Pipefitters
Thomas L. Dunn, Ass't. General Counsel
Len G. Loring, International Representative
T. L. Radford, Business Agent
Arby Norris, former Steward (pipefitter)
Hugh A. Radcliff, (instrument mechanic)

Carpenters and Joiners
C. M. Slinker, International Representative
D. L. Harbert, Local 1369
C. L. Canterbury, President, Local 1369

International Brotherhood of Electrical Workers
W. A. Berry, Business Agent
Willis Heldreth, former Steward

Company
H. W. Stull
A. S. Gilliam
W. T. Webb

Loring—That's settling a strike and leaving the strikers outside.

Stull—Everyone involved was working under a Contract. None were new employees. All were member of the Union.

Loring—Some of our members thought their first loyalty was to the Company and they came to work. Now you changed seniority and you are favoring those loyal to the Company over those who were loyal to their Union.

Stull—I think the thing that counts is loyalty to the job and keeping this facility running. Many realize this plant has shut down before and they don't want to see that happen again.

RESPONDENT'S EXCEPTION No. 7

7. Exception is taken to the finding on page 8, folios 10-22, that Respondent sought to establish "that the unions, on March 3, actually agreed to permit inclusion of the disputed clause in written agreements", upon the grounds that it is not supported by the evidence and is an inaccurate interpretation of the evidence introduced. Regardless of what "appears" (page 8, folio 12) to the Trial Examiner to be the case relative Respondent's "apparent claim" (page 8, folio 16) or Respondent's "apparent position", (page 9, folio 12) any question concerning the matter is resolved by reference to the notes of the March 3 meeting (R. Ex. 4) and to Respondent's letter of March 21 (G. C. Ex. 25) which the Trial Examiner quotes only in part to show clearly that Respondent was merely *proposing* the "strike-seniority provision".

[fol. 26] Argument and submission—March 20, 1956
(Omitted in printing)

[fol. 27] [File Endorsement Omitted]

IN UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 7127

OLIN MATHIESON CHEMICAL CORPORATION, PETITIONER

versus

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

On Petition for Review of an Order of the National Labor Relations Board

Argued March 20, 1956

Before PARKER, Chief Judge, and SOPER and DOBIE, Circuit Judges.

William A. Stuart and H. W. Stull for Petitioner; and Owsley Vose, Attorney, National Labor Relations Board, (Theophil C. Kammholz, General Counsel; David P. Findling, Associate General Counsel; Marcel Mallet-Prevost, Assistant General Counsel, and Nancy M. Sherman, Attorney, National Labor Relations Board, on brief) for Respondent.

[fol. 28] OPINION—April 9, 1956

DOBIE, Circuit Judge:

This case is before us upon the petition of the Olin Mathieson Chemical Corporation (hereinafter called Olin) to review and set aside an order of the National Labor Relations Board (hereinafter called the Board) issued against petitioner and Mathieson Chemical Corporation, its predecessor in interest, on October 18, 1955, following the usual

proceedings under Sections 9 and 10 of the National Labor Relations Act (61 Stat. 136, 29 U.S.C., Secs. 151, et seq.,) (hereinafter called the Act). In its answer to the petition, the Board has requested enforcement of its order.

The Board's order required Olin to cease and desist from the unfair labor practices found, or from in any other manner interfering with, restraining, or coercing its employees in the exercise of their statutory rights. Affirmatively, Olin was required to reinstate the unlawfully laid-off employees and make them whole for any loss of pay they may have suffered as a result of the discrimination against them; to rescind its discriminatory seniority policy and to restore all employees affected thereby to the seniority they would have enjoyed absent such discriminatory policy; upon request, to bargain with the Unions with respect to the units of which they are the respective certified representatives; and to post appropriate notices.

Two questions are presented to us:

(1) Whether the Board properly found that the Company violated Section 8(a)(3) and (1) of the Act by changing its seniority policy after a strike to give preference to nonstrikers and to employees who had returned to work during [fol. 29] the strike, and by laying off seven employees pursuant to its new policy.

(2) Whether the Board properly found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain collectively in good faith with the Unions.

The Board found, in agreement with the Trial Examiner, that Olin changed its seniority policy after the strike so as to give preference to employees who had worked during the strike in order to discipline employees adhering to the strike until the very end and that Olin's action in this regard, and its further action, pursuant to its new policy, in laying off seven employees who would not have been laid off under Olin's former seniority policy, was violative of Section 8(a)(3) and (1) of the Act. The Board further found, upon the basis of the entire course of the bargaining, and particularly, in view of the Company's insistence upon superseniority for nonstrikers or returning strikers, that the Com-

pany, therefore, had refused to bargain collectively in good faith in violation of Section 8(a)(5) and (1) of the Act.

In 1952, the Unions were certified by the Board as the bargaining representatives of the employees. Thereafter, Olin entered into collective bargaining agreements with the Unions, which were to expire February 10, 1954. No new agreements were effected before the strike on February 24, 1954.

We think we must uphold these findings of the Board, that we must deny Olin's petition to set aside the order of the Board, and that the Board's petition to enforce its order must be granted.

[fol. 30] Section 8(a)(3) of the Act forbids an employer by discrimination in regard to hire and tenure of employment to discourage membership in any labor organization. The protection of Section 8(a)(3) extends to "all elements of the employment relationship which in fact customarily attend employment and with respect to which an employer's discrimination may as readily be the means of interfering with employees' right of self-organization as if these elements were precise terms of a written contract of employment." *National Labor Relations Board* v. *Waterman Steamship Corp.*, 309 U.S. 206, 218. Moreover, Olin's superseniority policy is in conflict with Section 13 of the Act, providing that "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike * * *." 29 U.S.C. Sec. 163. As was said in the *per curiam* opinion in *Republic Steel Corporation* v. *National Labor Relations Board*, 114 F. (2d) 820, 821: "We think it was the intention of the Board, as it was of this court, to provide that upon reinstatement the striking employees were to be treated in all matters involving seniority and continuity of employment as though they had not been absent from work." See, also, *National Labor Relations Board* v. *Industrial Cotton Mills*, 208 F. (2d) 87, cert. denied 347 U.S. 935, *Home Beneficial Life Insurance Co.* v. *National Labor Relations Board*, 159 F. (2d) 280, cert. den. 332 U.S. 758.

Olin does not dispute the fact that the promulgation and implementation of its superseniority policy was discrimina-

tory in favor of employees abandoning or not participating in the strike and against those remaining on strike until it was called off. Nor does Olin deny that its action discouraged union activities. Olin's contention is twofold. First, relying on the Mackay Radio decision of the Su- [fol. 31] preme Court, *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, Olin contends that it was permissible, as a measure necessary to "protect and continue" its business, for it to replace the strikers with new employees, and hence it was proper (since the greater includes the less) for it to take the not so drastic action of depriving the strikers of seniority for layoff purposes in order to accomplish this same objective. Second, Olin contends that its conduct is sanctioned by the decision of the Ninth Circuit in the case of *National Labor Relations Board* v. *Potlatch Forests, Inc.*, 189 F. (2d) 82.

The Mackay decision merely holds that an employer need not displace employees hired during an economic strike to make room for returning strikers. And, in the opinion in that case, Mr. Justice Roberts went on to say (304 U. S. at pages 345-346):

> "Nor was it an unfair labor practice to replace the striking employes with others in an effort to carry on the business. Although §13 provides, 'Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike,' it does not follow that an employer, guilty of no act denounced by the statute, has lost the right to protect and continue his business by supplying places left vacant by strikers. And he is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them. The assurance by respondent to those who accepted employment during the strike that if they so desired their places might be permanent was not an unfair labor practice nor was it such to reinstate only [fol. 32] so many of the strikers as there were vacant places to be filled."

But the situation before us is quite different. The strike was over, the strikers had returned to work. The Olin

plant was in full operation. No promise, when they were employed, was made to the employees who remained at work during the strike, or who returned to work before the end of the strike, that their employment would be permanent. Olin, after the strike, when there was no necessity for such action to keep its plant in operation, promulgated its superseniority policy in favor of the so-called "loyal employees" and against those who returned to work after the strike had failed and was over. Olin was clearly penalizing the strikers for exercising their right to strike and was thereby clearly discouraging any exercise of this right in the future. This, we think, Olin cannot lawfully do. Olin's attorney, Stull, admitted in one of the conferences with Union representatives that Olin's insistence on the superseniority plan was motivated by Olin's preference for the employees who had been loyal to Olin by helping to break the strike, and also Olin's concern that the plant be not "shut down again."

The 7 employees unlawfully discharged were part of some 94 maintenance men laid off pursuant to Olin's new policy. These 7 had not worked during the strike but they had been hired by Olin prior to a corresponding number of retained employees who had worked during the strike.

It is quite obvious that Olin's application of the superseniorty policy here tended to discourage future strikes. Said Mr. Justice Reed, in *Radio Officers' Union* v. *National* [fol. 33] *Labor Relations Board*, 347 U. S. 17, 45: "Thus an employer's protestation that he did not intend to encourage or discourage must be unavailing where a natural consequence of his action was such encouragement or discouragement."

Olin relies heavily upon the Potlach case, *supra*, and there is much in Circuit Judge Orr's opinion that lends support to Olin's contention. The only important factual difference between Potlatch and our case seems to be "Potlatch advocated 'strike seniority' before the strike was settled, adopted that policy at the time of settlement and has consistently maintained that policy at all times thereafter." 189 F. (2d) at page 86. There was also doubt expressed in Judge Orr's opinion as to the motivation in applying the superseniority clause. Said Judge Orr (189 F. (2d) at

page 86): "In the instant case, therefore, the 'discriminations' between replacements and strikers is not an unfair labor practice despite a tendency to discourage union activities, because the benefit conferred upon the replacements is a benefit reasonably appropriate for the employer to confer in attempting 'to protect and continue his business by supplying places left vacant by strikers.' " In our case, the replacements seem all to have been old employees; in Potlatch, the replacements included both old and new employees.

From Judge Orr's opinion, we quote further (189 F. (2d) at page 86):

> "The record here does not disclose that Potlatch in fact assured the replacements that 'their places might be permanent'; however, that assurance need not be proved. The Supreme Court in the Mackay Radio case [fol. 34] was concerned not so much with an explicit promise of permanent tenure as with the propriety of the employer's concern for that tenure."

With this, we disagree. With a strike in progress, the primary concern of the employer is to keep his plant in operation. It is then proper for an employer, who might be unable to procure replacements save upon a promise of permanent tenure, to promise such tenure to the replacements. But when the strike is over, when the plant is in operation, then the imposition of the superseniority policy in favor of the replacements and against the strikers is quite a different matter. That is the case before us. There is nothing in the record here to show that, at the time Olin secured these replacements for the strikers, Olin made any promise of permanent tenure to these replacements. And we do not read the Mackay case as condoning this conduct on the part of Olin.

When it became apparent to the Unions that the strike was lost, they sought to resume negotiations with Olin. Olin's response was that they should make their proposals through the Federal Mediation and Conciliation Service. Finally, after delaying answering the Union's letter of March 23 formally requesting a bargaining meeting, Olin arranged a meeting on April 2. At this meeting Olin, while

offering to sign contracts with the Unions containing all provisions previously agreed to, demanded that the Unions agree to the incorporation in the seniority clause of the superseniority policy adopted after the strike. Despite the Unions' objections to this proposal, Olin a few days later nevertheless, and without further consultation with the Unions, effected a layoff in accordance with this policy.

Olin shortly thereafter refused to meet with the Unions, [fol. 35] stating that if the Unions had any proposals to make they should be submitted in writing. When the Unions subsequently submitted such proposals in writing, including a decreased wage demand, Olin rejected them, stated that it would not recede from its superseniority policy or from its refusal to grant a wage increase, and refused to meet further with the Unions on the ground that such action would be "futile".

The parties again met about ten months later, and although they were in agreement on all other issues, Olin still insisted on the incorporation of its superseniority policy in the contract. Although the Unions argued that this clause was illegal and that the decision on this issue should be held in abeyance until the Board had had a chance to pass on the question—and even offered to amend the proposed agreement to include this provision if the Board upheld its legality—Olin nevertheless persisted in its demnad for the inclusion of this provision in the agreement.

On these facts we must uphold the Board's finding that Olin violated Section 8(a) (5) and (1) of the Act by refusing to bargain collectively in good faith with the Unions.

It seems only fair to state that the record shows no past background of hostility towards the Unions on the part of Olin. Nor was there here any discrimination between employees who did belong to the Unions and those who did not; for all the employees involved were Union men.

For the reasons stated, we must decree enforcement of the Board's order requiring Olin to reinstate the employees unlawfully laid off under the superseniority policy and to make them whole for any loss of pay suffered; to rescind its [fol. 36] discriminatory policy; to bargain collectively in good faith with the Unions; and to post appropriate notices.

Order of the Board enforced.

SOPER, Circuit Judge, dissenting:

The opinion of the court is in direct conflict with that of the Ninth Circuit in *N.L.R.B.* v. *Potlatch Forests*, 189 F. 2d 82, which is not distinguishable in any essential feature, and presents in my opinion a reasonable approach to the problem under consideration. I base this dissent on the following passage from that opinion: (p. 86)

> "In the instant case, therefore, the 'discrimination' between replacements and strikers is not an unfair labor practice despite a tendency to discourage union activities, because the benefit conferred upon the replacements is a benefit reasonably appropriate for the employer to confer in attempting 'to protect and continue his business by supplying places left vacant by strikers.' Hence, we think the specific question posed here has been answered by the Supreme Court by recognizing that an employer attempting to fill a number of positions must be able to offer a substantial degree of security (as well as attractive wages), and that an employer may properly assure the replacements that [fol. 37-38] 'their places might be permanent.' If there are not enough jobs to go around at the time the strike is settled the rights of replacements prevail over strikers.
>
> While the Mackay Radio case (304 U.S. 333) can be formally distinguished on the ground that the Supreme Court in that case was considering a shortage of jobs at the time the strike was settled, rather than a shortage caused by a later curtailment of activities, the assurance of permanent employment in the latter event is equally justifiable."

[fol. 39] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 7127

OLIN MATHIESON CHEMICAL CORPORATION, Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD, Respondent

On Petition for Review of an Order of the National Labor Relations Board

JUDGMENT—April 9, 1956

This cause came on to be heard upon the petition of the Olin Mathieson Chemical Corporation to review and set aside a certain order issued against it by the National Labor Relations Board on the 18th day of October, 1955, in a proceeding before the Board numbered 6-CA-835, 6-CA-836 and 6-CA-837, entitled "In the Matter of Mathieson Chemical Corporation and/or Olin Mathieson Chemical Corporation and United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 152, AFL, and United Brotherhood of Carpenters and Joiners of America, Local 1369, AFL, and International Brotherhood of Electrical Workers, Local 425, AFL": upon the answer of the National Labor Relations Board and cross-petition for enforcement of said order; upon the transcript of the record in said proceeding; and the said cause was argued by counsel.

On consideration whereof, it is ordered, adjudged and decreed this 9th day of April, 1956, by the United States Court of Appeals for the Fourth Circuit, that the order of the Board in said proceeding be enforced, and that the Olin Mathieson Chemical Corporation abide by and perform [fol. 40] the directions of the National Labor Relations

Board in said order contained, in accordance with the opinion of this Court.

John J. Parker, Chief Judge, Fourth Circuit. Armistead M. Dobie, United States Circuit Judge.

I dissent:

Morris A. Soper, United States Circuit Judge.

[fol. 41] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 42] Supreme Court of the United States, October Term, 1956

No. 153

[Title omitted]

Order Allowing Certiorari—Filed October 8, 1956

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Office - Supreme Court, U. S.
JUN 9 1956
HAROLD B. WILLEY, Clerk

In the

Supreme Court of the United States

October Term, 1955

No. [redacted] 153

OLIN MATHIESON CHEMICAL CORPORATION,

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

WM. A. STUART
188 East Main Street
Abingdon, Virginia
Counsel of Record for Petitioner

H. W. STULL, *Labor Counsel*
Olin Mathieson Chemical Corporation
460 Park Avenue
New York 22, New York
Of Counsel

SUBJECT INDEX

Page

(a) Citations of the Opinions Below 2

(b) The Grounds on Which the Jurisdiction of This Court Is Invoked 3

(c) The Questions Presented for Review 4

(d) The Statutes Involved 4

(e) Statement of the Case 5

1. The Basis of Federal Jurisdiction of the Court Below 5
2. The Board's Decision 5
3. The Background of the Case 6
4. The Lay-offs 7
5. The Potlatch Case 9
6. Petitioner's Motivation 9
7. The Alleged Refusal to Bargain 10

(h) The Argument 11

1. The Decisions of the Ninth Circuit in the Potlatch Case and of the Fourth Circuit in the Present Case Are in Sharp Conflict 11
2. The Question Presented, Relative to the Right of an Employer to Replace Economic Strikers with Returning Strikers, Should Be Settled by This Court Because It Is Important in the Administration of the Act 12
3. The Court Below Erred in Construing the Act as Forbidding the Replacements 12

(A) Petitioner Had the Right to Replace the Strikers 12

(B) Petitioner's Actions Were Not Within the Prohibition of Sections 8(a)(3) and 8(a)(1) 17

Page

Opinion, Olin Mathieson Chemical Corporation v. National Labor Relations Board, ... F. 2d ..... (Apr. 9, 1956) ..... App. 1

Opinion, National Labor Relations Board v. Potlatch Forests, Incorporated, 189 F. 2d 82 ..... App. 11

TABLE OF AUTHORITIES

Aeronautical Lodge v. Campbell, 337 U. S. 521, 526 13

Medo Photo Supply Corp. v. National Labor Relations Board, 321 U. S. 678 14

National Labor Relations Board v. Mackay Radio & Telegraph Co., 304 U. S. 333, 345-6 12

National Labor Relations Board v. Penokee Veneer Co., 168 F. 2d 868 15

National Labor Relations Board v. Potlatch Forests, Inc., 189 F. 2d 82 ..... 2, 3, 9, 11, 12, 16, 20

National Labor Relations Board v. James Thompson & Co., 208 F. 2d 743 15

National Labor Relations Board v. Del E. Webb Construction Co., 196 F. 2d 702 ..... 17, 18

Texas Co. v. National Labor Relations Board, 198 F. 2d 540 .. 17, 18

In the

Supreme Court of the United States

October Term, 1955

No. .....

OLIN MATHIESON CHEMICAL CORPORATION,

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Olin Mathieson Chemical Corporation, which was the petitioner below on petition to review and set aside an order of the National Labor Relations Board which was respondent below, hereby prays that a writ of certiorari issue to review the decree entered by the United States Court of Appeals for the Fourth Circuit on the 9th day of April, 1956, with accompanying opinion by Judge Dobie

concurred in by Judge Parker, and dissenting opinion by Judge Soper, enforcing the said order of the National Labor Relations Board.

In this petition, the respondent is called the "Board," the charging Unions are called the "Unions," and the National Labor Relations Act as amended by the Labor Management Relations Act of 1947 is called the "Act." Page references to the appendices filed by the parties in the court below are in parenthesis: "PA" prefixed indicating petitioner's appendix, and "RA" respondent's appendix. All italics are petitioner's unless otherwise indicated.

Complying with Rule 21, petitioner has filed nine copies of the appendices filed by both parties below, together with a copy of all the proceedings in the court below, the whole duly certified.

(a)

CITATIONS OF THE OPINIONS BELOW

The Board's decision is cited as *Mathieson Chemical Corporation and/or Olin Mathieson Chemical Corporation and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 152, AFL, et al*, 114 NLRB, No. 85 (Oct. 18, 1955). This decision is printed in the petitioner's appendix below.

The decision of the court below is cited as *Olin Mathieson Chemical Corporation* v. *National Labor Relations Board*, ... F. 2d ..... (Apr. 9, 1956). The majority and dissenting opinions therein are appended hereto, together with the opinion of the Court of Appeals for the Ninth Circuit in the conflicting decision of *National Labor Relations Board* v. *Potlatch Forests, Inc.*, 189 F. 2d 82 (App. p. 11).

(b)

THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

1. Petitioner invokes the jurisdiction of this Court upon the following grounds:

(i) The decision of the court below is in conflict with the decision of the Court of Appeals for the Ninth Circuit in the case of *National Labor Relations Board* v. *Potlatch Forests, Inc., supra* (App. 11), involving the same question.

(ii) The court below has decided a question of interpretation of the Act, *relative to the right of an employer to replace economic strikers,* which has not been, but should be, settled by this Court on account of its importance in the administration of the Act.

(iii) The court below has erroneously construed and applied Sections 8(a)(1), 8(a)(3) and 8(a)(5) of the Act.

2. (i) The date of the decree of the court below was April 9, 1956, and it was entered at the same time.

(ii) No order has been entered herein respecting a rehearing or granting an extension of time within which to petition for certiorari.

(iii) The provisions of U. S. Code, Title 28, Sec. 1254, are believed to confer on this Court jurisdiction to review the decree in question by writ of certiorari.

(c)

THE QUESTIONS PRESENTED FOR REVIEW

The following questions are presented for review:

1. Was it an unfair labor practice, absent a contract and absent evidence of anti-union motivation, for petitioner to replace, in order of seniority with respect to future lay-offs, the employees who remained out until the end of the strike, by junior employees who crossed the picket lines and returned to work before the end of the strike, so that those who remained out until the end of the strike were in a lower seniority group with respect to liability to future lay-offs, than those then at work?

2. Was it a refusal to bargain, for petitioner to maintain the replacements mentioned in question No. 1, after bargaining thereon with the Unions to an impasse?

3. Exclusive of question numbered 2, was petitioner otherwise guilty of refusal to bargain, under the facts attending its negotiations with the Unions?

(d)

THE STATUTES INVOLVED

Section 8(a) of the Act defines the unfair labor practices of the employer. The Board has found that petitioner violated Sections 8(a)(1), 8(a)(3) and 8(a)(5) of the Act (PA 38, 40). So far as pertinent, they are as follows:

> "(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;"
>
> "(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: . . ."

"(5) to refuse to bargain collectively with the representatives of his employees, . . ."

Since Section 8(a)(1) refers to Section 7, we quote the latter to the extent pertinent:

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . .".

(c)

STATEMENT OF THE CASE

The facts are simple and without important conflict.

1.

The Basis of Federal Jurisdiction of the Court Below

The court below had jurisdiction under the provisions of Section 10(f) of the Act.

2.

The Board's Decision

The Board found, sustained by the court below, that petitioner was guilty of unfair labor practice in two respects:

(i) On April 9, 1954, petitioner, some three weeks after the failure of an economic strike, laid off 94 of the maintenance employees. The Board conceded that petitioner's motive in laying off *this number* was wholly economic, but, as to the individual employees laid off, it found that as to 7 out of the 94 petitioner was

> "motivated, not by any legitimate economic interest of its own, but by a desire to punish the 7 complainants for exercising the right guaranteed in Section 7 to engage in concerted activities, and a wish to reward the other employees for abandoning or not participating in the strike,"

thereby violating Sections 8(a)(3) and 8(a)(1) of the Act (PA 38). The effect of the Board's finding was that there were 7 other individual employees whom petitioner should have listed for lay-off instead of these particular 7. *As to the remaining 87 laid off, the Board found no illegal motivation.*

(ii) The Board found bad faith on the part of petitioner in bargaining negotiations commencing April 2, 1954, amounting to refusal to bargain, and thereby a violation of Section 8(a)(5) of the Act.

3.

The Background of the Case

Petitioner was named Mathieson Chemical Corporation at the time of the occurrences involved herein. On August 31, 1954 (subsequent to the alleged unfair practice), it merged with Olin Industries, Inc., and took its present name. The alleged unfair labor practices occurred at its Morgantown, West Virginia, plant.

The Board does not contend that petitioner has any history of anti-union bias or conduct, and nothing in the record suggests it.

Maintenance employees, numbering approximately 234 (PA 20), were members of the Unions in several separate bargaining units under uniform contracts containing a union shop clause (PA 34). The contracts expired February 10, 1954, and were not renewed because of inability of

the parties to agree upon the terms of a new contract after some weeks of negotiation (PA 5, 6, 20-1).

On February 24, 1954, the employees represented by the Unions were called out on strike to enforce their wage demands (PA 6). The production employees, who were represented by District 50 UMWA (RA 4) under a contract not then expiring, did not strike (PA 16-17). The plant did not close.

The strike was a failure. Some of the strikers crossed the picket lines and returned to work before the end of the strike. There is no contention that they returned in connection with any promise of benefit or threat of reprisal from petitioner, or any other form of illegal strike-breaking.

On March 17, the remaining strikers returned to work by direction of the Unions, without any advance notice to petitioner and without any agreement on terms (PA 7-8). *All the strikers, both those who crossed the picket lines and those who returned in a body at the end, were members of the Unions.*

No contract was in effect.

The Board concedes that this was an economic strike and makes no contention of unfair labor practice with respect to it (PA 47).

4.

The Lay-offs

Petitioner, on the basis of a study of its maintenance requirements made before the strike, had concluded to lay off 94 maintenance workers (PA 19). But the strike intervened. Promptly after the strike, petitioner made up the list of the 94 employees to be laid off, treating the employees who had returned to work before the end of the strike (RA 10), as replacements (on the seniority ladder with respect to the order of lay-off) of any employees senior

to them who had remained out until the end. It resulted that all the maintenance employees who were at work at the end of the strike were in a higher seniority group (with respect to the order of lay-off) than those who returned at the end of the strike.

Petitioner proposed union recognition of this replacement seniority status of the strikers who returned before the end of the strike, at a bargaining conference held on April 2, 1954 (PA 25). The spokesman of the Unions unqualifiedly and finally refused to agree to it, saying:

> ". . . the proposal was ridiculous and . . . totally unacceptable . . . He could leave it open indefinitely as far as I was concerned, but *we would never agree to it*" (PA 9).

An impasse having thus been reached (and no contract being in effect), petitioner, on April 9, 1954, laid off the 94 maintenance employees in accordance with their lay-off seniority after giving effect to the replacement seniority of the strikers who had returned before the strike ended.

The result was that 7 employees, out of the 94, were laid off who, but for the replacements, would have retained their jobs. This means that 87 of the laid-off employees had so little seniority that they would still have been laid off even if the replacements had not been made. The other 7 are the complainants in this proceeding. *The 7, who under the Board's holding should have been laid off instead of the complainants, were all among the strikers who had acquired replacement seniority by returning before the end of the strike.*

It is important to note that the 94 employees laid off from the maintenance group *were all members of the Unions*, as were all not laid off.

5.

The Potlatch Case

Petitioner's conduct here in the matter of replacement of economic strikers upon the seniority ladder, was precisely the same as that approved in *National Labor Relations Board* v. *Potlatch Forests, supra.* The *Potlatch* case gave careful consideration to a state of facts almost identical to that here. We shall comment upon that decision hereinafter.

6.

Petitioner's Motivation

The Board found, sustained by the court below, that petitioner's action in making the replacements was not with a view to protection of its interests, but was designed to discourage union membership in violation of Section 8(a)(3) of the Act, and to hinder the employees in their right to engage in concerted activities in violation of Section 8(a)(1) of the Act.

The Board's inference that petitioner's motivation in making the replacements, was in order to discourage union membership and to hinder the employees in their right to engage in concerted activities, is, we believe, unsupported by the record. The testimony shows, on the contrary, that petitioner made the replacements on the seniority ladder in the belief that the returning strikers were entitled to replacement status —

> ". . . *we owed these men an obligation* for as much job security as possible, that if at all possible they should be retained in the work group" (PA 16);

and that, so far as petitioner's interests were concerned, it would be a protective measure to recognize that obligation—

> ". . . my prime responsibility is to keep the plant operating" (PA 16).

The Board admits that its inference as to petitioner's motivation is unsupported by proof —

> "That no member of management admitted as a witness that the respondent (petitioner) acted with the intent of discouraging union membership is not a critical flaw in General Counsel's proof" (PA 64).

7.

The Alleged Refusal to Bargain

When, in the bargaining conference of April 2, 1954, hereinbefore mentioned, petitioner proposed to include recognition of the replacements in the seniority section of the new contracts which it then proposed to the Unions (PA 25), and the Unions refused, neither party would yield. The Board said that petitioner's

> ". . . insistence upon its seniority clause demand satisfies us that throughout the bargaining period involved, its conduct toward the Unions was colored by a bad faith resolve never to come to terms on a written agreement" (PA 39).

As to the "bad faith resolve," petitioner eventually reached agreement upon, and signed, a contract with one of the Unions (PA 76-9).

The Board's finding of bad faith in petitioner's bargaining rests primarily upon its conclusion that the replacements violated Sections 8(a)(3) and 8(a)(1) of the Act. Its view was that petitioner could not in good faith decline to yield on the point of contract recognition of the replacements, because it had no legal right to make the replacements.

Hence, the correctness of the Board's finding of bad faith in bargaining must stand or fall upon the correctness of its view with respect to the legality of the replacements.

The other incidents mentioned by the Board as indicating bad faith in bargaining are trivial, and doubtless would not have been noticed by the Board if standing alone. We deem it unnecessary to state here the facts with respect to them.

(h)

THE ARGUMENT

1.

The Decision of the Ninth Circuit in the Potlatch Case and of the Fourth Circuit in the Present Case Are in Sharp Conflict.

In *Potlatch*, the Ninth Circuit held that replacement of economic strikers with returning strikers with respect to seniority in event of future lay-offs, is permissible. In *Potlatch*, as here, the employer did not inform the strikers that if they would cross the picket lines, they would acquire replacement status, nor did it offer any other inducement to them to return to work. In *Potlatch* the terms of the contract recognition of the replacements, proposed by the employer to the union, were in substance the same as those here. In *Potlatch*, as here, the Union refused to agree and the employer maintained the replacements in effect without agreement. It is perfectly plain that in *Potlatch* the Ninth Circuit dealt with precisely the same primary question as here, and that the respective courts reached opposite conclusions.

The court below treated its present decision as in conflict with *Potlatch*, saying:

> "Olin relies heavily upon the *Potlatch Case, supra,* and there is much in Circuit Judge Orr's opinion that lends support to Olin's contention" (App. p. 6).

The Ninth Circuit was unanimous. In the Fourth, Judge Soper dissented and would have followed *Potlatch.* Thus, of the six judges, four have sustained petitioner's position.

We submit that certiorari should be granted to resolve the conflict.

2.

The Question Presented, Relative to the Right of an Employer to Replace Economic Strikers with Returning Strikers, Should Be Settled by This Court Because It is Important in the Administration of the Act.

The importance of settling, by decision of this Court, the primary question here is apparent, in view of the conflict between the Courts of Appeal. It is a matter of common knowledge that individual strikers frequently cross the picket lines before the end of a strike. The present question may be expected to arise again unless now settled by this Court. Its importance in the administration of the Act seems clear.

3.

The Court Below Erred in Construing the Act as Forbidding the Replacements

(A)

PETITIONER HAD THE RIGHT TO REPLACE THE STRIKERS

That petitioner had the right to replace the strikers, since the strike was economic, is not open to question. That principle was settled by this Court in *National Labor Relations*

Board v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 345-6. The court below so recognized (App. p. 5).

The replacements in *Mackay* were new employees, and therefore without previous seniority, but the court below does not question that returning strikers are equally eligible as replacements. Indeed, it could hardly be suggested that while new and inexperienced employees are entitled to the right of replacement, that right is denied to the old and experienced. It necessarily follows that since a returning striker can replace a striker in his entire job, he can *a fortiori* do so on the seniority ladder. Since the strikers' *jobs* were open to replacements, so also were their places on the seniority ladder (which, in the absence of contract, was subject to petitioner's regulations—*Aeronautical Lodge* v. *Campbell*, 337 U. S. 521, 526). The greater includes the less. This proposition also the court below does not question in its decision.

The ground upon which the court below denied the returning strikers the replacement seniority right is a narrow one, namely, that since the returning strikers crossed the picket line without the inducement of a "promise . . . that their employment would be permanent," therefore petitioner was under "no *necessity* for such action to keep its plant in operation" (App. p. 5). The court thus appears to condition petitioner's right to make these replacements upon its being made to appear that petitioner was *unable* to keep its plant in operation without the replacements and, further, that it could obtain them only by communicating to them a "promise" that if they would cross the picket lines, "their employment would be permanent."

With due respect to the court's opinion, we have found no other authority for such a restriction upon the right of replacement. *Mackay* did not so hold. It is there stated that

> ". . . an employer, guilty of no act denounced by the statute, has (not) lost the right to protect and continue his business by supplying places left vacant by strikers" (304 U. S. at p. 345).

It seems sufficiently obvious that an employer might have a number of reasons, with a view to his legitimate business interests, for believing that replacement of economic strikers would aid him to "protect and continue his business," besides the single extremity specified by the court below.

With regard to the requirement imposed by the court below of a "promise" of replacement seniority status in order to induce the replacements to return to work, we respectfully suggest that the court overlooked the fact that such conduct on the part of the petitioner would have constituted illegal strike-breaking and thus a violation of Section 8(a)(1). The authorities to that effect are numerous. In fact, in the present case, the Trial Examiner, whose findings were approved by the Board, found on this very point:

> "Had the Respondent (petitioner) merely *offered* (Board's emphasis) such an inducement to its employees while they were on strike, its act would have been found violative of the Act by the Board, in accordance with its decision in *Dinion Coil Co., Inc.* (110 NLRB No. 27)."

The Trial Examiner could readily have cited many more authorities to the point. In *Medo Photo Supply Corp.* v. *National Labor Relations Board,* 321 U. S. 678, an analogous case, it was said (at p. 684):

> ". . . The statute guarantees to all employees the right to bargain collectively through their chosen representatives. Bargaining carried on by the employer directly with the employees, whether a minority or majority,

> who have not revoked their designation of a bargaining agent, would be subversive of the mode of collective bargaining which the statute has ordained, as the Board, the expert body in this field has found. Such conduct is therefore an interference with the rights guaranteed by Section 7 and a violation of Section 8(1) of the Act."

In *National Labor Relations Board* v. *James Thompson & Co.* (C. A. 2—1953), 208 F. 2d 743, the employer said to one of the strikers (208 F. 2d at p. 748):

> "John, bring them all back and in a week they will all be satisfied."

The Board held that this constituted an offer of an inducement to cross the picket lines and was thereby a violation of Section 8(a)(1). The Second Circuit granted enforcement.

In *National Labor Relations Board* v. *Penokee Veneer Co.* (C. A. 7—1948), 168 F. 2d 868, the employer communicated with the individual strikers for the purpose of ascertaining how many of them would return to work upon the same terms and conditions which had been offered to their bargaining representative and by it refused. No special inducements of any kind were promised to those who might return. The Board found a violation of Section 8(a)(1), upon the ground that

> "respondent sought to by-pass the C.I.O. as exclusive bargaining representative of the strikers and to deal with each striker on an individual basis" (168 F. 2d at p. 870).

The Seventh Circuit, one judge dissenting, refused to enforce, but only upon the ground that "no other or different

terms were mentioned to the employees" than had previously been offered to the bargaining representative, and that the employer had no anti-union background (168 F. 2d at pp. 870-1).

The court below, in connection with its point that petitioner was under "no necessity" to make the replacements, finds significance in the fact that petitioner's policy under which the replacements were made, was not "promulgated" until after the strike was over (App. p. 5). The record does not show when the returning strikers were informed of their replacement seniority status, though it is true that the Unions were not formally notified until the first bargaining conference held after the strike (two weeks after the strike), at which time petitioner submitted to them the hereinbefore mentioned written form of contract recognition of the replacements. But surely the date of "promulgation" is immaterial. After all, the replacements were made when the returning strikers were put to work. The places on the seniority ladder were then open and were then filled. Was not the status then fixed?

In *Potlatch* the Ninth Circuit dealt directly with the points thus raised by the decision of the court below, saying (App. p. 19):

> "While the *Mackay Radio* case can be formally distinguished on the ground that the Supreme Court in that case was considering a shortage of jobs at the time the strike was settled, rather than a shortage caused by a later curtailment of activities, the assurance of permanent employment in the latter event is equally justifiable.
>
> "The record here does not disclose that Potlatch in fact assured the replacements that 'their places might be permanent;' however, that assurance need not be proved. The Supreme Court in the *Mackay Radio* case

> was concerned not so much with an explicit promise of permanent tenure as with the propriety of the employer's concern for that tenure . . . The propriety of this concern was settled in the *Mackay Radio* case."

We submit that the question of the correctness of the restriction imposed by the court below upon the right of replacement ought to be considered by this Court.

(B)

PETITIONER'S ACTIONS WERE NOT WITHIN THE PROHIBITION OF SECTIONS 8(a)(3) AND 8(a)(1)

The court below was dealing with the application of specific statutory prohibitions.

As to the alleged violation of Section 8(a)(3) (discrimination to discourage union membership), we point out that *all the employees involved* were members of the Unions. It is very difficult to see how, in that situation, petitioner's motivation could have been to discourage union membership, or how its actions could have produced that effect. If, instead of the complainants, 7 of the replacements had been laid off (as the Board contended should have been done), the latter would have been union members, too. The effect upon the union membership would thus have still been the same. It does not appear from the record that the Unions lost any members as a result of the alleged violation of Section 8(a)(3), or that the Unions were thereby prevented from obtaining any members.

In *National Labor Relations Board* v. *Del E. Webb Construction Co.* (C. A. 8), 196 F. 2d 702, and in *Texas Co.* v. *National Labor Relations Board* (C. A. 9), 198 F. 2d 540, those courts were dealing with the converse state of facts, in that the employees found by the Board to have been discriminated against were *ineligible to union membership.*

The courts applied the same reasoning outlined above, which seems clearly applicable, and both courts cited *Potlatch* to the point. In the *Webb* case, it was said (196 F. 2d at p. 705-6):

> "The respondent union, prior to the time Pickard joined the apprentice unit, had a seniority rule. This rule gave preference or priority to the veteran operators but those who joined as apprentices accepted this rule and Pickard has never indicated a desire to renounce his union status. It must be borne in mind that he was not eligible to membership in Local 101 and he actively sought such membership prior to the incident here involved. In these circumstances we are unable to see how the discrimination against him as here charged encouraged membership in the respondent union or discouraged membership in Local 101-B. Pickard could scarcely have been encouraged to become a journeyman member of respondent union because under no circumstances could he become such member. His status so far as union affiliations were concerned, was fixed and could not be changed at least by any act of the respondent company. It can scarcely be said that one may effectively be encouraged to do or not to do that which he is incapable of doing.
>
> "So in the instant case, it being impossible for Pickard to become a member of the respondent union, nothing that respondent company might do by way of discriminating against him could be said proximately to encourage him to join a union which it was impossible for him to join. There can be no violation of this statute unless the conduct complained of can have the proximate and predictable effect of encouraging or discouraging membership in a labor organization. N.L.R.B. v. Winona Textile Mills, 8 Cir., 160 F. 2d 201; N.L.R.B. v. Potlatch Forests, 9 Cir. 189 F. 2d 82; Western Cartridge Co. v. N.L.R.B., 7 Cir. 139 F. 2d 855."

In the *Texas Company* case, the complainant was a super-

visory employee and, as such, not a union member. It was said (198 F. 2d at p. 544):

> "We turn to the Board's holding that by declining to reemploy Cody for nonsupervisory work the petitioner violated Sec. 8(a)(3) of the Act. Its basic finding in support of this ruling is that petitioner's refusal 'necessarily discouraged membership' in the labor organization involved. As already indicated, the Board agreed that Sec. 2(3) of the Act privileged Cody's discharge, and that the petitioner refused to employ him for the conduct which occasioned the discharge. It did not hold that petitioner's refusal was motivated by a purpose to interfere with or discourage union activity by rank-and-file employees. It would seem clearly to follow, as the minority of the Board pointed out, that if any discouragement of union membership were occasioned, it would be incidental and permissible under the Act. N.L.R.B. v. Potlatch Forests, 9 Cir., 189 F. 2d 82, 85, 86; Panaderia Sucesion Alonso. Note 8, supra."

We therefore submit that when the language of Section 8(a)(3) is considered, the facts with respect to petitioner's actions do not fall within the prohibition of the statute.

As to the alleged violation of Section 8(a)(1) (interference with the right to engage in concerted activities, *i.e.*, here, to strike), the court below bases its approval of the Board's findings upon the following (App. pp. 5-6):

> "Olin was clearly penalizing the strikers for exercising their right to strike and was thereby clearly *discouraging* (N.B.—the statutory words are 'interfere with, restrain, or coerce', and do not include 'discourage') any exercise of this right *in the future.*"

We think that the court below, in reaching this conclusion, must have overlooked the fact that the replacements did not concern a *future* strike in any way, but only the strike which ended March 17, 1954. The fact was that the respective

seniority status was fixed automatically when the remaining strikers returned in a body on March 17, 1954. Employees then at work were in the first list; those then returning were in the second. *That was the determinative date,* and the rights of any *future* strikers, in any future strike, could not in any way be affected thereby.

Even if it be conceded (for the sake of argument only), that the replacements so made by petitioner might be expected to "interfere with, restrain or coerce" petitioner's employees in respect of the exercise of their right to engage in a *future* strike, it seems clear that such a factor would reasonably be wholly lost and dissipated in the far greater and more far-reaching effect resulting from *the loss of the strike,* in which the strikers lost three weeks' time and failed of any gains.

In *Potlatch,* the court considered any incidental effects of the replacements with respect to future strikes, and reached the conclusion that no violation of Section 8(a)(1) was involved, saying (App. pp. 16-7):

> ". . . Potlatch has exhibited no anti-union prejudices, and in making the selection has provided that all of the individuals in the returning group retain full seniority rights as between themselves.
>
> "There has been no discrimination between union and non-union employees on the basis of union membership, as in the case of National Labor Relations Board v. Waterman S. S. Corp., 1940, 309 U. S. 206, 60 S. Ct. 493, 84 L. ed. 704. The group of replacements includes union members, some of whom had been out on strike but had returned to their jobs before the strike was settled. The sole 'discrimination' charged is between the replacements and those strikers who returned to work after the strike was settled. As between these two groups, no 'discrimination' is charged with regard to rates of pay, promotions, etc., The sole 'discrimination' charged is said to be found in the 'strike seniority'

policy, by which the strikers returning after the settlement of the strike are laid off before the replacements, in the event of an economic curtailment. . . .

"(3) Unlike the usual case, the unfair labor practice charged here is the adoption of a general policy applicable to all employees, rather than isolated acts of discrimination. Presumably, the Board impliedly found that the true purpose motivating Potlatch's adoption of the 'strike seniority' policy was a desire to penalize those members of the Union who had most persistently asserted the Union's demands. The only evidence to support such a finding is the conclusion that Potlatch must have realized the inevitable consequences of the policy. Such a conclusion is not enough to support the finding of a discriminatory motive where the conduct complained of is consistent with the legitimate exercise of the employer's 'right to protect and continue his business by supplying places left vacant by strikers.' National Labor Relations Board v. Mackay Radio & Telegraph Co., 1938, 304 U. S. 333, 345, 58 S. Ct. 904, 911, 82 L. Ed. 1381."

We submit that when the language of Section 8(a)(1) is considered, the conclusion of the court below that petitioner's actions "discouraged" the exercise of the right to strike "in the future," and thereby constituted a violation of Section 8(a)(1), ought to be reviewed by this court by certiorari.

Respectfully submitted,

WM. A. STUART
188 East Main Street
Abingdon, Virginia
Counsel of Record
for Petitioner

H. W. STULL, *Labor Counsel*
Olin Mathieson Chemical Corporation
460 Park Avenue
New York 22, New York
Of Counsel

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 7127

OLIN MATHIESON CHEMICAL CORPORATION,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

ON PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

(Argued March 20, 1956. Decided April 9, 1956)

Before Parker, Chief Judge, and Soper and Dobie, Circuit Judges.

William A. Stuart and H. W. Stull for Petitioner; and Owsley Vose, Attorney, National Labor Relations Board, (Theophil C. Kammholz, General Counsel; David P. Findling, Associate General Counsel; Marcel Mallet-Prevost, Assistant General Counsel, and Nancy M. Sherman, Attorney, National Labor Relations Board, on brief) for Respondent.

DOBIE, Circuit Judge:

This case is before us upon the petition of the Olin Mathieson Chemical Corporation (hereinafter called Olin)

to review and set aside an order of the National Labor Relations Board (hereinafter called the Board) issued against petitioner and Mathieson Chemical Corporation, its predecessor in interest, on October 18, 1955, following the usual proceedings under Sections 9 and 10 of the National Labor Relations Act (61 Stat. 136, 29 U. S. C., Secs. 151, *et seq.*) (hereinafter called the Act). In its answer to the petition, the Board has requested enforcement of its order.

The Board's order required Olin to cease and desist from the unfair labor practices found, or from in any other manner interfering with, restraining, or coercing its employees in the exercise of their statutory rights. Affirmatively, Olin was required to reinstate the unlawfully laid-off employees and make them whole for any loss of pay they may have suffered as a result of the discrimination against them; to rescind its discriminatory seniority policy and to restore all employees affected thereby to the seniority they would have enjoyed absent such discriminatory policy; upon request, to bargain with the Unions with respect to the units of which they are the respective certified representatives; and to post appropriate notices.

Two questions are presented to us:

(1) Whether the Board properly found that the Company violated Section 8(a)(3) and (1) of the Act by changing its seniority policy after a strike to give preference to nonstrikers and to employees who had returned to work during the strike, and by laying off seven employees pursuant to its new policy.

(2) Whether the Board properly found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain collectively in good faith with the Unions.

The Board found, in agreement with the Trial Examiner,

that Olin changed its seniority policy after the strike so as to give preference to employees who had worked during the strike in order to discipline employees adhering to the strike until the very end and that Olin's action in this regard, and its further action, pursuant to its new policy, in laying off seven employees who would not have been laid off under Olin's former seniority policy, was violative of Section 8(a)(3) and (1) of the Act. The Board further found, upon the basis of the entire course of the bargaining, and particularly, in view of the Company's insistence upon superseniority for nonstrikers or returning strikers, that the Company, therefore, had refused to bargain collectively in good faith in violation of section 8(a)(5) and (1) of the Act.

In 1952, the Unions were certified by the Board as the bargaining representatives of the employees. Thereafter, Olin entered into collective bargaining agreements with the Unions, which were to expire February 10, 1954. No new agreements were effected before the strike on February 24, 1954.

We think we must uphold these findings of the Board, that we must deny Olin's petition to set aside the order of the Board, and that the Board's petition to enforce its order must be granted.

Section 8(a)(3) of the Act forbids an employer by discrimination in regard to hire and tenure of employment to discourage membership in any labor organization. The protection of Section 8(a)(3) extends to "all elements of the employment relationship which in fact customarily attend employment and with respect to which an employer's discrimination may as readily be the means of interfering with employees' right of self-organization as if these elements were precise terms of a written contract of employment." *National Labor Relations Board* v. *Waterman Steamship*

Corp., 309 U. S. 206, 218. Moreover, Olin's superseniority policy is in conflict with Section 13 of the Act, providing that "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike. . ." 29 U. S. C. Sec. 163. As was said in the *per curiam* opinion in *Republic Steel Corporation* v. *National Labor Relations Board*, 114 F. (2d) 820, 821: "We think it was the intention of the Board, as it was of this court, to provide that upon reinstatement the striking employees were to be treated in all matters involving seniority and continuity of employment as though they had not been absent from work." See, also, *National Labor Relations Board* v. *Industrial Cotton Mills*, 208 F. (2d) 87, cert. denied 347 U. S. 935, *Home Beneficial Life Insurance Co.* v. *National Labor Relations Board*, 159 F. (2d) 280, cert. den. 332 U. S. 758.

Olin does not dispute the fact that the promulgation and implementation of its superseniority policy was discriminatory in favor of employees abandoning or not participating in the strike and against those remaining on strike until it was called off. Nor does Olin deny that its action discouraged union activities. Olin's contention is twofold. First, relying on the Mackay Radio decision of the Supreme Court, *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, Olin contends that it was permissible, as a measure necessary to "protect and continue" its business, for it to replace the strikers with new employees, and hence it was proper (since the greater includes the less) for it to take the not so drastic action of depriving the strikers of seniority for layoff purposes in order to accomplish this same objective. Second, Olin contends that its conduct is sanctioned by the decision of the Ninth Circuit in the case of *National Labor Relations Board* v. *Potlatch Forests, Inc.*, 189 F. (2d) 82.

The Mackay decision merely holds that an employer need not displace employees hired during an economic strike to make room for returning strikers, and, in the opinion in that case, Mr. Justice Roberts went on to say (304 U. S. at pages 345-346):

> "Nor was it an unfair labor practice to replace the striking employees with others in an effort to carry on the business. Although § 13 provides, 'Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike,' it does not follow that an employer, guilty of no act denounced by the statute, has lost the right to protect and continue his business by supplying places left vacant by strikers. And he is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them. The assurance by respondent to those who accepted employment during the strike that if they so desired their places might be permanent was not an unfair labor practice nor was it such to reinstate only so many of the strikers as there were vacant places to be filled."

But the situation before us is quite different. The strike was over, the strikers had returned to work. The Olin plant was in full operation. No promise, when they were employed, was made to the employees who remained at work during the strike, or who returned to work before the end of the strike, that their employment would be permanent. Olin, after the strike, when there was no necessity for such action to keep its plant in operation, promulgated its superseniority policy in favor of the so-called "loyal employees" and against those who returned to work after the strike had failed and was over. Olin was clearly penalizing the strikers

for exercising their right to strike and was thereby clearly discouraging any exercise of this right in the future. This, we think, Olin cannot lawfully do. Olin's attorney, Stull, admitted in one of the conferences with Union representatives that Olin's insistence on the superseniority plan was motivated by Olin's preference for the employees who had been loyal to Olin by helping to break the strike, and also Olin's concern that the plant be not "shut down again."

The 7 employees unlawfully discharged were part of some 94 maintenance men laid off pursuant to Olin's new policy. These 7 had not worked during the strike but they had been hired by Olin prior to a corresponding number of retained employees who had worked during the strike.

It is quite obvious that Olin's application of the superseniority policy here tended to discourage future strikes. Said Mr. Justice Reed, in *Radio Officers' Union* v. *National Labor Relations Board*, 347 U. S. 17, 45: "Thus an employer's protestation that he did not intend to encourage or discourage must be unavailing where a natural consequence of his action was such encouragement or discouragement."

Olin relies heavily upon the Potlatch case, *supra*, and there is much in Circuit Judge Orr's opinion that lends support to Olin's contention. The only important factual difference between Potlatch and our case seems to be "Potlatch advocated 'strike seniority' before the strike was settled, adopted that policy at the time of settlement and has consistently maintained that policy at all times thereafter." 189 F. (2d) at page 86. There was also doubt expressed in Judge Orr's opinion as to the motivation in applying the superseniority clause. Said Judge Orr (189 F. (2d) at page 86): "In the instant case, therefore, the 'discrimination' between replacements and strikers is not an unfair labor practice despite a tendency to discourage union activities, because the benefit

conferred upon the replacements is a benefit reasonably appropriate for the employer to confer in attempting 'to protect and continue his business by supplying places left vacant by strikers.' " In our case, the replacements seem all to have been old employees; in Potlatch, the replacements included both old and new employees.

From Judge Orr's opinion, we quote further (189 F. (2d) at page 86):

> "The record here does not disclose that Potlatch in fact assured the replacements that 'their places might be permanent'; however, that assurance need not be proved. The Supreme Court in the Mackay Radio case was concerned not so much with an explicit promise of permanent tenure as with the propriety of the employer's concern for that tenure."

With this, we disagree. With a strike in progress, the primary concern of the employer is to keep his plant in operation. It is then proper for an employer, who might be unable to procure replacements save upon a promise of permanent tenure, to promise such tenure to the replacements. But when the strike is over, when the plant is in operation, then the imposition of the superseniority policy in favor of the replacements and against the strikers is quite a different matter. That is the case before us. There is nothing in the record here to show that, at the time Olin secured these replacements for the strikers, Olin made any promise of permanent tenure to these replacements. And we do not read the Mackay case as condoning this conduct on the part of Olin.

When it became apparent to the Unions that the strike was lost, they sought to resume negotiations with Olin. Olin's response was that they should make their proposals

through the Federal Mediation and Conciliation Service. Finally, after delaying answering the Union's letter of March 23 formally requesting a bargaining meeting, Olin arranged a meeting on April 2. At this meeting Olin, while offering to sign contracts with the Unions containing all provisions previously agreed to, demanded that the Unions agree to the incorporation in the seniority clause of the superseniority policy adopted after the strike. Despite the Union's objection to this proposal, Olin a few days later nevertheless, and without further consultation with the Unions, effected a layoff in accordance with this policy.

Olin shortly thereafter refused to meet with the Unions, stating that if the Unions had any proposals to make they should be submitted in writing. When the Unions subsequently submitted such proposals in writing, including a decreased wage demand, Olin rejected them, stated that it would not recede from its superseniority policy or from its refusal to grant a wage increase, and refused to meet further with the Unions on the ground that such action would be "futile."

The parties again met about ten months later, and although they were in agreement on all other issues, Olin still insisted on the incorporation of its superseniority policy in the contract. Although the Unions argued that this clause was illegal and that the decision on this issue should be held in abeyance until the Board had had a chance to pass on the question—and even offered to amend the proposed agreement to include this provision if the Board upheld its legality —Olin nevertheless persisted in its demand for the inclusion of this provision in the agreement.

On these facts we must uphold the Board's finding that Olin violated Section 8(a)(5) and (1) of the Act by refusing to bargain collectively in good faith with the Unions.

It seems only fair to state that the record shows no past background of hostility towards the Unions on the part of Olin. Nor was there here any discrimination between employees who did belong to the Unions and those who did not; for all the employees involved were Union men.

For the reasons stated, we must decree enforcement of the Board's order requiring Olin to reinstate the employees unlawfully laid off under the superseniority policy and to make them whole for any loss of pay suffered; to rescind its discriminatory policy; to bargain collectively in good faith with the Unions; and to post appropriate notices.

Order of the Board enforced.

SOPER, Circuit Judge, dissenting:

The opinion of the court is in direct conflict with that of the Ninth Circuit in *N. L. R. B.* v. *Potlatch Forests,* 189 F. 2d 82, which is not distinguishable in any essential feature, and presents in my opinion a reasonable approach to the problem under consideration. I base this dissent on the following passage from that opinion (p. 86):

> "In the instant case, therefore, the 'discrimination' between replacements and strikers is not an unfair labor practice despite a tendency to discourage union activities, because the benefit conferred upon the replacements is a benefit reasonably appropriate for the employer to confer in attempting 'to protect and continue his business by supplying places left vacant by strikers.' Hence, we think the specific question posed here has been answered by the Supreme Court by recognizing that an employer attempting to fill a number of positions must be able to offer a substantial degree of se-

curity (as well as attractive wages), and that an employer may properly assure the replacements that 'their places might be permanent.' If there are not enough jobs to go around at the time the strike is settled the rights of replacements prevail over strikers.

While the Mackay Radio case (304 U. S. 333) can be formally distinguished on the ground that the Supreme Court in that case was considering a shortage of jobs at the time the strike was settled, rather than a shortage caused by a later curtailment of activities, the assurance of permanent employment in the latter event is equally justifiable."

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 12532

NATIONAL LABOR RELATIONS BOARD,
Petitioner

v.

POTLATCH FORESTS, INCORPORATED,
Respondent

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

(Decided May 11, 1951 Rehearing denied July 6, 1951)

Before Orr and Pope, Circuit Judges, and Fee, District Judge.

Robert N. Denham, Gen. Counsel, David P. Findling, Associate Gen. Counsel, A. Norman Somers, Asst. Gen. Counsel, Fannie M. Boyls, Albert M. Dreyer, Maurice Alexandre, Attorneys, N.L.R.B., Washington, D. C., for petitioner.

R. N. Elder, Robt. H. Elder, Sidney E. Smith, Coeur d'Alene, Idaho, George W. Beardmore, Lewiston, Idaho, for respondent.

ORR, Circuit Judge.

National Labor Relations Board seeks enforcement of its order requiring respondent Potlatch Forests to cease and

desist from maintaining the "strike seniority" policy, hereinafter described, on the ground that said policy discriminates against union members in violation of Sec. 8(a)(3) of the National Labor Relations Act, as amended, 29 U.S.C.A. §158(a)(3).

In 1944 the International Woodworkers of America was certified, and has since been recognized, as the exclusive bargaining agent for Potlatch's production and maintenance employees in its various establishments in Idaho. On April 1, 1946 Potlatch and the Union (the I.W.A. and its four locals) executed a Master Working Agreement, to expire at the end of one year, providing inter alia for seniority rights to govern in case of a reduction in force. Negotiations to renew this agreement in the spring of 1947 were disrupted over the question of wage differentials. An agreement extending all other provisions of the 1946 agreement until April 1, 1948, was executed, leaving the disputed question for further negotiations.

The parties being unable to agree, the Union called a strike in August 1947, thereby causing a shutdown of all the operations of Potlatch. Near the end of August 1947 Potlatch managed to resume operations, gradually accumulating both new employees and former employees who crossed the picket lines. The strike was later terminated and this group (hereinafter termed the "replacements") numbered about 1750 out of a normal complement in the bargaining unit of about 2600.

On October 10, 1947, the strike being hopelessly lost, the Union initiated negotiations to settle it. In the course of settlement negotiations, Potlatch vigorously asserted its desire to protect the job security of the replacements, as against possible displacement by those who would return on termination of the strike. The Union, on the other hand, desired that the seniority rights of this latter group (hereinafter

called the "strikers") be fully protected. An agreement was reached and the strike terminated on October 13, 1947.

Immediately thereafter (apparently on October 14), Potlatch drafted in writing the "strike seniority" policy which gave rise to these proceedings. Under this policy, the strikers (those who returned to work on or after October 13) were to be laid off ahead of the replacements (those new or former employees who were working on or before October 12), in case a reduction in force should become necessary by reason of a curtailment of Potlatch's activities. While this draft was not publicized at that time, the Board has stipulated that Potlatch has maintained the "strike seniority" policy without deviation since October 13, 1947.

In the spring of 1948 Potlatch and the Union undertook negotiations to renew their agreement and consolidate all prior agreements into one master agreement. They apparently reached an agreement, and initialed a memorandum to that effect. However, when the proposed master agreement was prepared by Potlatch and submitted to the Union for signature, the Union representatives refused to sign on the ground that a provision purporting to incorporate the "strike seniority" policy had not been agreed upon, or discussed, in the negotiations. Hence, the 1948 master agreement never became effective, but the parties continued to operate under previous understandings.

Meanwhile, Potlatch continued to maintain the "strike seniority" policy. We have no knowledge as to the exact time this policy was in fact applied to an individual case. The Board bases its petition not only on the maintenance of this general policy but also to its application in the case of two individuals, Cloninger and Walters, on December 30, 1948 and January 18, 1949. Both of these men were strikers who had remained out until the strike was terminated, and both were "bumped" by workers with inferior seniority

rights, as measured on the pre-strike basis. Cloninger filed a grievance, which was carried by the Union to the highest authority provided for in the grievance procedure, short of conciliation. At that point, the grievance was settled and the Union agreed that Cloninger be put back to work under the "strike seniority" policy, but expressly noted that the Union was not agreeing to the general validity of that policy. Walters filed no grievance.

On February 16, 1949, a charge was filed by the International Woodworkers of America, Local 10-364, signed by the vice-president of the International. This charge, as later amended, alleged that Potlatch violated Sec. 8(a)(1) and (3) of the Act, in maintaining and giving effect to the "strike seniority" policy. At the hearing before the Trial Examiner, the general counsel conceded that Sec. 8(a)(1) was involved only to the extent that the alleged violation of Sec. 8(a)(3) would itself constitute a violation of the broader Sec. 8(a)(1), there being no issue of an independent interference with the rights of employees guaranteed by Sec. 7. The Board held that Potlatch's conduct violated Sec. 8(a)(3), which provides that it "shall be an unfair labor practice for an employer * * * by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *." The Board ordered Potlatch to cease and desist from maintaining or giving effect to the "strike seniority" policy and to post the customary notices. 87 N.L.R.B. 1193. The Board made no order relative to reinstatement of Cloninger and Walters, as they had already returned to work. No back pay was ordered for the reason that no claim was made in one case and was not justified in the other.

[1] The Act does not confer upon Cloninger and Walters, nor upon the other strikers, specific seniority rights of which

it is alleged they are being deprived; the Act merely prohibits discrimination in establishing and applying seniority policies. Seniority rights generally derive their scope and significance from union contracts. Aeronautical Industrial Lodge v. Campbell, 1949, 337 U. S. 521, 526, 69 S. Ct. 1287, 93 L. Ed. 1513. The Board found that Potlatch in 1947 agreed to, and has at all times since been bound by, contractual provisions conferring upon the strikers seniority rights of which they are being deprived by the application of the strike seniority policy. This finding was made despite Potlatch's contentions that the Union in 1947 agreed to, and has at all times since been bound by, the strike seniority policy.

Contrary to the significance given the various agreements by the Board, we deem it unnecessary to consider the validity of the Board's finding because a charge that the maintenance by Potlatch of the "strike seniority" policy constitutes a breach of a collective bargaining agreement should properly have been brought under Sec. 8(a)(1) or (5). That the charge in this case is confined to Sec. 8(a)(3) was conceded by counsel for the Board at the hearing before the Trial Examiner. (Record p. 88) Sec. 8(a)(3) prohibits *discrimination*, not breach of contract. So far as Sec. 8(a)(3) is concerned, Potlatch may adopt any rule of seniority it desires—whether or not that rule violates an existing agreement—so long as that rule does not discourage union membership by discrimination. Cf., Kansas City Power & Light Co. v. National Labor Relations Board, 8 Cir., 1940, 111 F. 2d 340, 351-353. Hence, the sole question for determination is whether the acts charged constitute discrimination under Sec. 8(a)(3).

[2] In considering this question, it must be recognized at the outset that this case concerns what is generally termed an "economic strike," rather than an "unfair labor practice

strike." If this strike had resulted from an unfair labor practice of Potlatch, proceedings to remedy that unfair labor practice, if not barred by the limitations of Sec. 10(b), could properly culminate in an order of reinstatement with full seniority rights, if the Board concluded that that remedy was appropriate to wipe out the effects of the prior unfair labor practice. Cf., Republic Steel Corp. v. National Labor Relations Board, 3 Cir. 1940, 114 F. 2d 820.

In this case the Board, being concerned with a simple "economic strike," in order to sustain an unfair labor practice must hold that the maintenance of the "strike seniority" policy, in and of itself constitutes an unfair labor practice. The Board cites Republic Steel Corp. v. National Labor Relations Board, supra; Polish National Alliance v. National Labor Relations Board, 7 Cir. 1943, 136 F. 2d 175; National Labor Relations Board v. Star Pub. Co., 9 Cir., 1938, 97 F. 2d 465. We do not consider those cases controlling because of the nature of the strike.

Also, cases dealing with a discriminatory selection, among the returning strikers, of those individuals to be reinstated to fill the vacancies remaining when the strike is terminated, such as, National Labor Relations Board v. Mackay Radio & Telegraph Co., 1938, 304 U. S. 333, 346, 58 S. Ct. 904, 82 L. Ed. 1381; National Labor Relations Board v. Sandy Hill Iron & Brass Works, 2 Cir. 1947, 165 F. 2d 660; cf., National Labor Relations Board v. Walt Disney Productions, 9 Cir., 1944, 146 F. 2d 44, have no application. Potlatch has exhibited no anti-union prejudices, and in making the selection has provided that all of the individuals in the returning group retain full seniority rights as between themselves.

There has been no discrimination between union and non-union employees on the basis of union membership, as in the case of National Labor Relations Board v. Waterman S.S.

Corp., 1940, 309 U. S. 206, 60 S. Ct. 493, 84 L. Ed. 704. The group of replacements includes union members, some of whom had been out on strike but had returned to their jobs before the strike was settled. The sole "discrimination" charged is between the replacements and those strikers who returned to work after the strike was settled. As between these two groups, no "discrimination" is charged with regard to rates of pay, promotions, etc. The sole "discrimination" charged is said to be found in the "strike seniority" policy, by which the strikers returning after the settlement of the strike are laid off before the replacements, in the event of an economic curtailment.

Failure of an employer to maintain previous seniority rights for returning strikers may be said to discourage union membership, but many acts of an employer which seem to come within the language of Sec. 8(a)(3) are nevertheless permissible if they are done for a legitimate business purpose. "The act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them. The employer may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization and representation, and, on the other hand, the Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than such intimidation and coercion. The *true purpose* is the subject of investigation with full opportunity to show the facts." National Labor Relations Board v. Jones & Laughlin Steel Corp., 1937, 301 U. S. 1, 45-46, 57 S. Ct. 615, 628, 81 L. Ed. 893. (Emphasis supplied.)

[3] Unlike the usual case, the unfair labor practice charged here is the adoption of a general policy applicable to all employees, rather than isolated acts of discrimination. Presumably, the Board impliedly found that the true purpose mo-

tivating Potlatch's adoption of the "strike seniority" policy was a desire to penalize those members of the Union who had most persistently asserted the Union's demands. The only evidence to support such a finding is the conclusion that Potlatch must have realized the inevitable consequences of the policy. Such a conclusion is not enough to support the finding of a discriminatory motive where the conduct complained of is consistent with the legitimate exercise of the employer's "right to protect and continue his business by supplying places left vacant by strikers." National Labor Relations Board v. Mackay Radio & Telegraph Co., 1938, 304 U. S. 333, 345, 58 S. Ct. 904, 911, 82 L. Ed. 1381. While the employer may know that hiring replacements tends to dissipate the effects of the strike, and thereby tends to discourage union activities, such conduct is regarded as a legitimate weapon of economic warfare. Reasonable "discrimination" in the exercise of this right is justified by the employer's legitimate interest. He "is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them. The assurance by (the employer) to those who accepted employment during the strike that if they so desired their places might be permanent was not an unfair labor practice, nor was it such to reinstate only so many of the strikers as there were vacant places to be filled." National Labor Relations Board v. Mackay Radio & Telegraph Co., supra, 304 U. S. at page 345-346, 58 S. Ct. at page 911.

[4] In the instant case, therefore, the "discrimination" between replacements and strikers is not an unfair labor practice despite a tendency to discourage union activities, because the benefit conferred upon the replacements is a benefit reasonably appropriate for the employer to confer

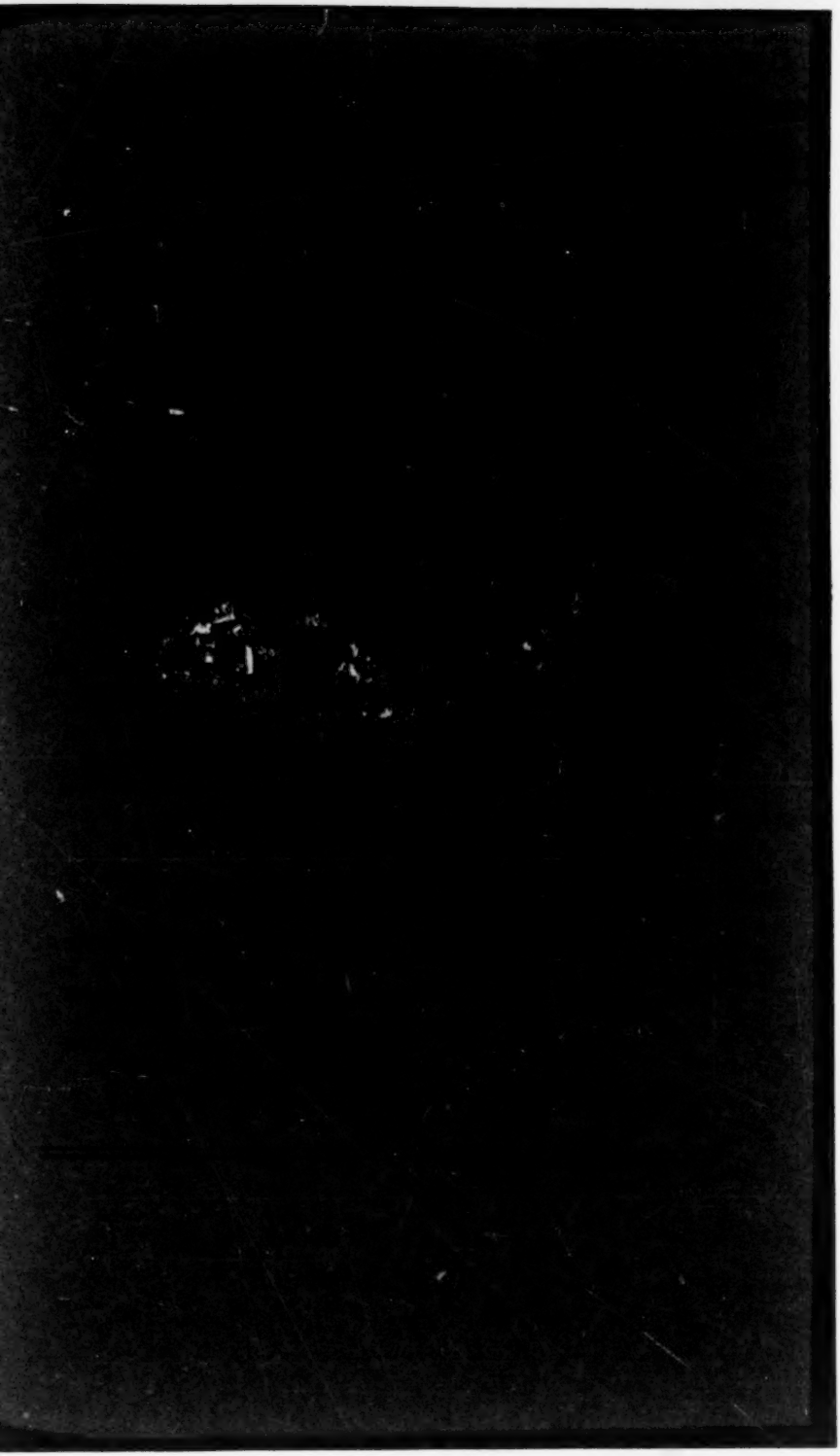
in attempting "to protect and continue his business by supplying places left vacant by strikers." Hence, we think the specific question posed here has been answered by the Supreme Court by recognizing that an employer attempting to fill a number of positions must be able to offer a substantial degree of security (as well as attractive wages), and that an employer may properly assure the replacements that "their places might be permanent." If there are not enough jobs to go around at the time the strike is settled the rights of replacements prevail over strikers.

While the Mackay Radio case can be formally distinguished on the ground that the Supreme Court in that case was considering a shortage of jobs at the time the strike was settled, rather than a shortage caused by a later curtailment of activities, the assurance of permanent employment in the latter event is equally justifiable.

The record here does not disclose that Potlatch in fact assured the replacements that "their places might be permanent"; however, that assurance need not be proved. The Supreme Court in the Mackay Radio case was concerned not so much with an explicit promise of permanent tenure as with the propriety of the employer's concern for that tenure. In this case Potlatch advocated "strike seniority" before the strike was settled, adopted that policy at the time of settlement and has consistently maintained that policy at all times thereafter. Potlatch has, since prior to the settlement of the strike, endeavored to make the places of the replacements as nearly permanent as may be. The propriety of this concern was settled in the Mackay Radio case.

Having concluded that the Board erred in holding that Potlatch committed an unfair labor practice makes it unnecessary to consider other questions presented.

Petition denied.



INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	2
Argument	8
Conclusion	11

CITATIONS

Cases:

Associated Press v. *National Labor Relations Board*, 301 U. S. 103 — 8

Black v. *Cutter Laboratories*, No. 92, October Term, 1955 — 9

National Labor Relations Board v. *Gaynor News Company*, 197 F. 2d 719, affirmed, 347 U. S. 17 — 10

National Labor Relations Board v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1 — 8

National Labor Relations Board v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333 — 7, 8

National Labor Relations Board v. *Potlatch Forests, Inc.*, 189 F. 2d 82 — 7, 8, 9

National Labor Relations Board v. *Stowe Spinning Company*, 336 U. S. 226 — 8

Radio Officers' Union v. *National Labor Relations Board*, 347 U. S. 17 — 8, 10

Statutes:

National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*):

Section 2 (3) — 2, 9

Section 7 — 4

Section 8 (a) (1) — 4, 6

Section 8 (a) (3) — 4, 9

Section 8 (a) (5) — 6

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 153

OLIN MATHIESON CHEMICAL CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (Pet. App. pp. 1–13) is not yet reported. The findings of fact, conclusions of law, and order of the Board (P. A. 36–76) are reported at 114 N. L. R. B. No. 85.

JURISDICTION

The decree of the court below was entered on April 9, 1956 (Pet. App. 1). The petition for a writ of certiorari was filed on June 9, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the Board properly found that petitioner violated Section 8 (a) (3) and (1) of the Act by discriminatorily reducing the seniority of reinstated economic strikers as a penalty for striking.

2. Whether substantial evidence supports the Board's finding that petitioner violated Section 8 (a) (5) and (1) of the Act by refusing to bargain in good faith with the unions representing its employees.

STATUTE INVOLVED

Section 2 (3) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151 *et seq.*), provides:

Sec. 2. When used in this Act—

* * * * *

> (3) The term "employee" shall include * * * any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute * * *.

Other pertinent provisions of the Act are set forth in the Petition, pp. 4–5.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT, CONCLUSIONS, AND ORDER

1. PETITIONER'S DISCRIMINATION AGAINST STRIKERS

From February 24 to March 17, 1954, a number of petitioner's 234 maintenance employees engaged in an economic strike to support the position of their bar-

gaining representatives[1] in contract negotiation (P. A. 46–47; 4–7, 20).[2] Although petitioner hired no new employees, its plant continued to operate with a work force of employees who remained at work and strikers who returned to work of their own accord during the course of the strike (P. A. 51, n. 5, 61, 63; 16, R. A. 22, R. 129). When the Unions called off the strike on March 17, petitioner reinstated the remaining strikers (P. A. 48; R. 50–51). Thereafter, at an April 2 bargaining session with the Unions, petitioner for the first time proposed a superseniority clause under which the full term strikers would automatically be junior in seniority to employees who had abandoned or not participated in the strike and further announced an imminent layoff of 94 maintenance men to be selected accordingly (P. A. 50; 8–10, 25, R. A. 10, R. 60, 98–99, 105–106). Among the employees laid off on April 9 were seven erstwhile strikers who, aside from the strike, were senior in point of service to a number of retained employees (P. A. 50–51; 2–3). The layoff of these seven was inconsistent with the seniority provisions in expired

[1] The maintenance employees were represented by three unions: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fittings Industry of the United States and Canada, Local 152, AFL; United Brotherhood of Carpenters and Joiners of America, Local 1369, AFL; and International Brotherhood of Electrical Workers, Local 425, AFL (herein collectively called the Unions).

[2] References to petitioner's appendix are designated "P. A."; to the Board's appendix "R. A."; and to the typewritten transcript "R." References to the General Counsel's Exhibits are designated "G. C. Ex."; and to petitioner's exhibits "Co. Ex."

contracts with the Unions and with petitioner's practice in laying off production employees (P. A. 46, 51; 2–3, G. C. Ex. 5, 6, 7, R. A. 4). In explanation for changing its seniority policy after the strike, petitioner stated it "felt that the ones that come across the picket line * * * deserved a little * * * something for helping support the breaking [of] the strike" and that, in view of their "loyalty to the job" and petitioner's concern that the plant not "shut down * * * again," it "owed these men an obligation for as much job security as possible" (R. A. 61–62; 16, R. A. 8, 22, R. 29).

The Board found (P. A. 37–38, 61–65) that petitioner, in promulgating and implementing the super-seniority policy after the strike, was "motivated, not by any legitimate economic interest of its own, but by a desire to punish the complainants for exercising the right guaranteed in Section 7 to engage in concerted activities, and a wish to reward the other employees for abandoning or not participating in the strike," and that its conduct was accordingly violative of Section 8 (a) (3) and (1) of the Act.

2. PETITIONER'S REFUSAL TO BARGAIN IN GOOD FAITH

When the strike interrupted contract negotiations on February 24, 1954, petitioner and the Unions had reached agreement on many issues, but others, including wage rates, remained unsettled (P. A. 47; 5, R. 92–93, 41–45). Thereafter, on March 15, 23, and 29, the Unions requested a resumption of negotiations (P. A. 48–50; 23–24; R. A. 3, G. C. Ex. 13, R. 52, 54). After first replying that the Unions should make their

proposals through the Federal Mediation and Conciliation Service, petitioner finally agreed to meet on April 2 (P. A. 48, 50; R. A. 3, 54–55). At this meeting petitioner offered to sign contracts containing all provisions previously agreed to if the Unions would agree to the superseniority policy adopted after the strike (P. A. 50; 8–9, 25, R. A. 10, R. 60). Despite the Unions' vigorous objections to the proposal, petitioner a few days later, without further consultation with the Unions, effected a layoff in accordance with this policy (P. A. 50–51; 2–3, 9, R. 99). Petitioner shortly thereafter refused to meet with the Unions, stating that if the Unions had any proposals to make they should be submitted in writing (P. A. 51; R. 59). When the Unions subsequently submitted such proposals in writing, petitioner rejected them, stated that it would not recede from its superseniority policy or from its refusal to grant a wage increase, and refused to meet further with the Unions on the ground that this would be "futile" (P. A. 51–52; 26–27, R. A. 15, R. 59, 60, G. C. Ex. 16). The parties again met about ten months later, after the Unions had filed unfair labor practice charges, and although they were in agreement on all other issues, petitioner still insisted upon incorporating its superseniority policy in the contract (P. A. 53, 54; 11, R. A. 4–5, 22, R. 61, 71–77, 129, 137, 145–148, Co. Ex. 4). Rejecting the Unions' argument that the clause was illegal, and their suggestions that the decision on this issue should be held in abeyance until the Board had passed on the question, or that the proposed agreement be amended to include this provision only if the Board upheld its legality, peti-

tioner persisted in its demand for immediate inclusion of the superseniority provision (P. A. 55–58; 30–31, R. A. 17–21, R. 66, 69, 70, 83, G. C. Ex. 24, 25, 26).

Upon the basis of the entire course of the bargaining, and particularly in view of petitioner's insistence upon discriminatory superseniority for nonstrikers and returning strikers, the Board found that petitioner's "conduct towards the Unions was colored by a bad faith resolve never to come to terms on a written agreement," and that petitioner had therefore refused to bargain in good faith in violation of Section 8 (a) (5) and (1) of the Act (P. A. 38–40, 65–67).

3. THE BOARD'S ORDER

The Board ordered petitioner to cease and desist from the unfair labor practices found and from in any manner infringing upon its employees' exercise of their statutory rights. Affirmatively, the Board ordered petitioner to reinstate the seven unlawfully laid-off employees and make them whole for any loss of pay suffered by reason of the discrimination against them; to rescind its discriminatory seniority policy and restore all employees affected thereby to the seniority they would have enjoyed absent such discriminatory policy; to bargain with the Unions upon request; and to post appropriate notices (P. A. 40–42, 74–76).

B. THE DECISION OF THE COURT BELOW

The court below by a divided vote (Pet. App. 1–10) sustained the Board's findings and enforced its order. Rejecting petitioner's contention that its super-

seniority policy was a permissible measure to protect and continue its business like the replacement of economic strikers sanctioned by *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, the court distinguished that case on the ground that an employer is entitled to promise replacements permanent employment in order to keep his plant in operation during the strike, whereas petitioner discriminated in favor of "loyal employees" after the strike, not to keep operating but in order to penalize the strikers and discourage future strikes (Pet. App. 4–6). Distinguishing *National Labor Relations Board* v. *Potlatch Forests, Inc.*, 189 F. 2d 82 (C. A. 9), the majority of the court below found that in *Potlatch* the employer advocated its seniority policy before the strike was settled and there was no evidence that its motive was to penalize the strikers. In the instant case, however, the court stated (Pet. App. 5–6):

> Olin was clearly penalizing the strikers for exercising their right to strike and was thereby clearly discouraging any exercise of this right in the future. * * * Olin's attorney, Stull, admitted in one of the conferences with Union representatives that Olin's insistence on the superseniority plan was motivated by preference for the employees who had been loyal to Olin by helping to break the strike, and also Olin's concern that the plant be not "shut down again."

Commenting further on the opinion in *Potlatch*, the court below indicated its disagreement in any event

with the Ninth Circuit's failure to distinguish between promises of permanent tenure made during a strike in order to procure replacements and the post-strike imposition of a superseniority policy in favor of strikebreakers and against the reinstated strikers. Finally, upon the basis of the "entire course of the bargaining" as well as petitioner's insistence upon superseniority, the lower court found adequate record support for the Board's finding that petitioner had refused to bargain in good faith with the Unions.

ARGUMENT

1. Contrary to petitioner's contention (Pet. 11–12), the instant decision is not in conflict with *National Labor Relations Board* v. *Potlatch Forests, Inc.*, 189 F. 2d 82 (C. A. 9), for the court below found (Pet. App. 5–6) that petitioner's superseniority policy was motivated by a desire to penalize the strikers and discourage future strikes, whereas the court in *Potlatch* found no "discriminatory motive" (Pet. App. 17–18). That a discriminatory reason suffices to make unlawful conduct which is permissible if done for a legitimate business purpose, has long been settled by numerous decisions of this Court.[3] In *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 345–347, the Court stated that an

[3] See e. g., *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 45–46; *Associated Press* v. *National Labor Relations Board*, 301 U. S. 103, 132; *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 345–346; *National Labor Relations Board* v. *Stowe Spinning Company*, 336 U. S. 226, 233; *Radio Officers' Union* v. *National Labor Relations Board*, 347 U. S. 17, 42–44.

employer might properly refuse to reinstate replaced economic strikers as an incident of his right to "protect and continue his business" during the strike, but held that the employer's refusal to reinstate five replaced strikers was nevertheless unlawful because his motive was in fact discriminatory. The court below was therefore correct in holding that petitioner's discriminatorily motivated seniority policy was violative of the Act. Accordingly, this case does not present the question, which petitioner seeks to raise (Pet. 11–17) and which was involved in *Potlatch,* as to whether—absent such a discriminatory motive—an employer may properly reduce the seniority of reinstated economic strikers for purposes of subsequent layoffs. While the court below expressed disagreement with certain language in the *Potlatch* opinion, this affords no reason for review, since the Court "reviews judgments, not statements in opinions." *Black* v. *Cutter Laboratories,* No. 92, October Term, 1955, sl. op. 5. Moreover, the cornerstone of petitioner's argument—that as it was free to replace strikers altogether, it was free to reduce their seniority (Pet. 12–13)—is manifestly erroneous, for unless and until the striker is replaced he retains his status as an employee under Section 2 (3) of the Act, and hence retains his seniority.

Petitioner's further argument (Pet. 17–19) that its conduct did not discourage union membership in violation of Section 8 (a) (3) of the Act because the favored and penalized employees were all union members, rests on cases which preceded this Court's deci-

sion in *Radio Officers' Union* v. *National Labor Relations Board*, 347 U.S. 17, 29–42. The strike to support the Unions' bargaining position was clearly union activity and the proscription of Section 8 (a) (3) includes "discrimination to discourage participation in union activities as well as to discourage adhesion to union membership" (347 U.S. at 39–40). Equally without merit is petitioner's contention, with respect to the Section 8 (a) (1) violation (Pet. 19–21), that because the strike was over when it penalized strikers to avoid a "shut down again," there was no infringement upon the exercise of the right to strike or none that was not overshadowed and justified by the restraint inherent in the loss of the strike. "If there is a reasonable likelihood that the effects may be felt years later, then a reasonable interpretation of the Act demands that the employer be deemed a violator." *National Labor Relations Board* v. *Gaynor News Company*, 197 F. 2d 719, 722–723 (C.A. 2), affirmed, 347 U.S. 17, 38, 55. Restraint upon the future exercise of a statutory right was here, as in *Gaynor*, "a natural consequence of discrimination," and petitioner is accountable for "increasing the number of workers" who would want to refrain from striking "and/or their quantum of desire" (347 U.S. 17, 38, 46).

2. Petitioner is also mistaken in the claim (Pet. 10–11) that the violation of Section 8 (a) (5) must stand or fall with the legality of the superseniority policy. The court below sustained the Board's finding of bad faith bargaining upon the basis of the "en-

tire course of the bargaining," and this evidentiary issue presents no question warranting further review by this Court.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF,
Solicitor General.

THEOPHIL C. KAMMHOLZ,
General Counsel,
DOMINICK L. MANOLI,
Assistant General Counsel,
RUTH V. REEL,
Attorney,
National Labor Relations Board.

JULY 1956.

U. S. GOVERNMENT PRINTING OFFICE: 1956

FILED
DEC 13 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 153

OLIN MATHIESON CHEMICAL CORPORATION, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR PETITIONER

WM. A. STUART
188 East Main Street
Abingdon, Virginia
Counsel of Record
for Petitioner

H. W. STULL
Olin Mathieson Chemical Corporation
460 Park Avenue
New York 22, New York
Of Counsel

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

TABLE OF CONTENTS

	Page
(a) The Decisions Below	2
(b) The Grounds on Which the Jurisdiction of this Court is Invoked	2
(c) The Statutes Involved	3
(d) The Questions Presented for Review	4
(e) Statement of the Case	5
1. The Facts	5
2. The Decision of the Board	12
3. The Decision of the Court Below	13
(f) Summary of Argument	14
(g) The Argument	18
1. Petitioner Had the Right to Retain as Permanent Employees Those Who Were Already at Work When the Rest of the Strikers Returned on March 17	18
2. The Board and the Court Below Erred in Finding That the Unions Had Terminated Their Strike Before the Layoff List Was Drawn	27
3. None of the Employees Had Any Seniority Rights Because the Contracts Had Expired and the Board's Order Imposing Its Own Seniority Policy Upon Petitioner Is Beyond Its Authority	31
4. Petitioner Did Not Refuse to Bargain in Good Faith	33
(h) Conclusion	39

Page

TABLE OF AUTHORITIES CITED

CASES:

Aeronautical Industrial District Lodge 727 v. *Campbell*, 337 U.S. 521 31
American Rubber Products Co., 106 NLRB 73 30
Columbia Pictures Corporation, 64 NLRB 490 ....21, 23
Dinion Coil Co., Inc., 110 NLRB 196 30
Elder v. *New York Central Railroad Company* (CA 6), 152 F. 2d 361 32
Kansas Milling Co. v. *N.L.R.B.*, 185 F. 2d 413 26
N.L.R.B. v. *American National Insurance Co.*, 343 U.S. 395 .....36, 39
N.L.R.B. v. *Corsicanna Cotton Mills* (CA 5), 179 F. 2d 234 36
N.L.R.B. v. *I.B.S. Mfg. Co.* (CA 5), 210 F. 2d 634 .. 36
N.L.R.B v *Mackay Radio and Telegraph Co.*, 304 U.S. 333 .....14, 15, 17, 18, 19, 21, 23, 25, 26, 34
N.L.R.B. v. *Sands Mfg. Co.*, 306 U.S. 332 26
N.L.R.B. v. *Whittier Mills Company* (CA 5), 123 F. 2d 725 36
N.L.R.B. v. *Potlatch Forests, Inc.*, 189 F. 2d 82 ..2, 14, 23, 24, 29, 30
Polish National Alliance v. *N.L.R.B.*, 136 F. 2d 175 (CA 7) 22
Republic Steel v. *N.L.R.B.*, 114 F. 2d 820 13
Texas Co., 93 NLRB 1358 30
Trailmobile Co. v. *Whirls*, 331 U.S. 40, 53 note 21 .. 32
Union Bus Terminal of Dallas, Inc., 97 NLRB 206 21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 153

OLIN MATHIESON CHEMICAL CORPORATION, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

Certiorari to the United States Court of Appeals for the Fourth Circuit to Review a Decree Enforcing an Order of the National Labor Relations Board

---

BRIEF FOR PETITIONER

In this brief, the respondent is called "the Board", the three charging unions are called "the Unions", the National Labor Relations Act, as amended by the Labor Management Relations Act of 1947, is called "the Act", and petitioner is sometimes called "the Company."

The printed record consists of petitioner's appendix in the court below paged 1-79 inclusive, and respondent's appendix paged separately 1-23 inclusive. Appended to respondent's appendix are the proceedings in the court below, continuing the same paging. Page references to the record are in parentheses; "PA" prefixed indicates petitioner's appendix, "RA" respondent's appendix and the proceedings in the court below, and "R" the typewritten transcript. References to the General Counsel's exhibits are designated "GC Ex.", and to petitioner's exhibits "CO Ex."

(a) THE DECISIONS BELOW

(1) The decision and order of the Board with the intermediate report appended (PA 36-76) are reported at 114 NLRB 486.

(2) The majority and minority opinions of the court below (RA 25-32) are reported at 232 F. 2d 158.

(b) THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

Petitioner invokes the jurisdiction of this Court upon the following grounds:

1. (i) By the provisions of U. S. Code, Title 28, Sec. 1254, this Court has jurisdiction to review the decree in question by writ of certiorari.

(ii) The decision of the court below is in conflict with the decision of the Court of Appeals for the Ninth Circuit in the case of *National Labor Relations Board* v. *Potlatch Forests, Inc.*, 189 F. 2d 82, involving the same question.

(iii) The court below has decided a question of interpretation of the Act, relative to the right of an employer to replace economic strikers, which has not been, but should be settled by this court on account of its importance in the administration of the Act.

(iv) The court below has erroneously construed and applied Sections 8(a)(1), 8(a)(3) and 8(a)(5) of the Act.

2. (i) The decree of the court below was dated and entered on April 9, 1956.

(ii) The petition for a writ of certiorari was filed on June 9, 1956.

(c) THE STATUTES INVOLVED

Section 8(a) of the Act defines the unfair labor practices of the employer. The Board has found that petitioner violated Sections 8(a)(1), 8(a)(3) and 8(a)(5) of the Act (PA 38, 40). So far as pertinent, these subsections read as follows:

> "(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;
>
> "(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: . . .
>
> "(5) to refuse to bargain collectively with the representatives of his employees, . . . "

Since Section 8(a)(1) refers to Section 7, we quote the latter to the extent pertinent:

> "Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organ-

> izations, . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . ."

Section 8(d) defines the duty of collective bargaining. It is as follows:

> "(d) for the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . ."

(d) THE QUESTIONS PRESENTED FOR REVIEW

The following questions are presented for review:

1. Was it an unfair labor practice (*absent a contract* and absent evidence of anti-union discrimination or motivation) for petitioner to replace, in order of seniority with respect to future lay-offs, the group of employees who remained out until the end of an economic strike, with employees as a group who either declined to strike or who, having struck, crossed the picket lines and returned to work before the end of the strike, so that the employees who remained out until the end of the strike were placed in a lower seniority group than those then at work, with respect to liability to future lay-offs?

2. Was it a refusal to bargain, for petitioner (*still absent a contract*) to maintain the replacements mentioned in Question No. 1, after bargaining thereon with the Unions to an impasse?

3. Exclusive of Question No. 2, was petitioner otherwise guilty of refusal to bargain, under the facts attending its negotiations with the Unions?

(e) STATEMENT OF THE CASE

1. The Facts

There is no real conflict concerning the facts of this case, which we summarize as follows:

Petitioner is a corporation operating chemical plants situated in several states (GC Ex. 2). This case is concerned with occurrences at its plant in Morgantown, West Virginia, a facility leased to petitioner by the United States for a term ending in 1956 (CO Ex. 4, p. 4), with the privilege of extension for an additional period at the end of the term. Petitioner's operation of the plant began in 1952, when the Unions were certified as bargaining representatives (RA 27). As historical background, the plant was previously operated for the United States successively by other employers and just prior to the lease to petitioner the plant was shut down for more than a year (R 151-4).

Operation for the term ending 1956 was a trial run, at the end of which petitioner's top management would decide whether to exercise its option to extend the lease. The record shows that both the local plant management and many of the employees were deeply concerned to make a production record which would

favorably impress petitioner's top management and cause it to extend the lease and thereby keep the plant in operation (CO Ex. 4, p. 4).

Maintenance employees, numbering approximately 234 (PA 20) were members of the Unions, which represented them in bargaining with petitioner under the Board's certifications. Uniform contracts were in effect (GC Ex. 4(a), 4(b), and 4(c)), including a union shop clause and a no-strike clause. Another labor organization, District 50 United Mine Workers, with a contract, represents the production workers who constitute the bulk of the employees (PA 16-17, 20; RA 4). This Union is not involved in the case here.

The petitioner has no anti-union background (RA 31).

During the fall of 1953, the local plant management became disturbed over the high maintenance costs at the plant (PA 14). Following studies of maintenance problems commenced in October, the local plant manager concluded early in February, 1954, that the maintenance forces were over-staffed. The decision was then made to reduce the number of jobs by 94 (PA 19). The Board does not contend that this decision involved any unfair labor practice, *but concedes that it was economic* (PA 15).

The expiration date of the contracts was February 10, 1954. Despite several weeks of prior negotiation, the parties were unable to reach agreement, primarily because of the Unions' demand for higher wages. Petitioner had taken the position that it was not prepared to grant any wage increase (PA 20, 47). The Federal Mediation and Conciliation Service was

requested by petitioner and Unions jointly to intervene (PA 19-21), and did so (PA 6), but the impasse was not resolved. The contracts expired, before the contemplated layoff was made or announced.

On February 24, 1954, the Unions called a strike to enforce their wage demands (PA 6). The Board makes no contention that the strike was either caused or prolonged by any unfair labor practice, *but concedes that it was entirely economic in character* (PA 47).

The production workers, covered by the District 50 contract, refused to honor the picket lines of the Unions and continued to report to work, thereby keeping the plant in operation (PA 16-17). Essential maintenance work was performed by some of the maintenance employees who either refused to strike or subsequently repudiated the strike and reported for assignment (PA 8-9).

On Monday, March 15, 1954, the plant manager wrote a letter to Radford, principal spokesman for the Unions, notifying him that on Wednesday, March 17th, petitioner would "start to interview applicants for *some of the jobs* which were formerly filled by striking employees" (PA 22). (Petitioner evidently considered it unnecessary to interview applicants to fill *all* the jobs of the strikers, because of its prior decision to make a substantial reduction in force). On receipt of the letter, Radford requested a resumption of negotiations. Petitioner requested him to relay the proposal to the Mediation official who had been in charge of the preceding bargaining conferences (PA 23).

On the evening of March 16, a Citizens' Committee, which the Board concedes had no connection with the management (PA 48), but which had been in touch with Radford, inquired of him whether he would be agreeable, if the Citizens' Committee requested him to do so and negotiations were resumed, to return the strikers to work under the terms of the old agreement (PA 7). Radford immediately, without waiting for such request, directed the remaining strikers to return to work on March 17 (PA 8). This they did without notice to petitioner, and as Radford subsequently stated in a letter, "without any agreement whatsoever" (PA 49).

When the remaining strikers returned to work pursuant to the Unions' instructions, the number of permanent jobs still unfilled was considerably smaller than the number of returning strikers, in view of the previous decision to reduce the maintenance forces by 94. All the men, however, were placed on the payroll, since the composition of the layoff list had not been decided (RA 10). It was completed shortly before March 29 (RA 10).

On March 23, Radford wrote petitioner stating that he had contacted the Federal Mediation Service, that petitioner's negotiator was not then available and that the Unions were now offering to meet to negotiate further on the "unresolved issues" with a view to reaching a written agreement (PA 23-4). Not receiving an immediate answer, Radford wrote again on March 29, stating that in directing the strikers to return "without any agreement whatsoever", he had hoped to demonstrate the sincere desire of the Unions to resolve their issues, but that if petitioner continued to ignore "his efforts to resolve our differences, *the*

alternatives which we may pursue are very limited" (PA 49). On the next day, petitioner acknowledged the March 23 letter and suggested April 2 as the date for the requested bargaining conference (PA 24-5).

Thereupon the conference was held on April 2, at which petitioner proposed the terms of a new contract which it offered to sign. In the course of the meeting, petitioner announced the elimination of the 94 jobs and its intention to retain in permanent jobs the employees who had declined to strike or had returned to work prior to March 17 (the date of the end of the strike), and also announced that its plan was to allocate the remainder of the permanent jobs among the strikers who returned at the end of the strike, in the order of their respective lengths of service in their respective work groups (PA 8-9, 25).

Petitioner at the same conference requested the Unions to agree to inclusion in the contract of a paragraph of the seniority clause reading as follows (PA 25):

> "Anything in this Article IV on seniority to the contrary notwithstanding, employees in the journeyman classification and employees in the Helper Classification within a Work Group covered by this Contract who were not at work from February 25, 1954, until at or after noon on March 17, 1954, shall be laid off before any employee so classified in the same Work Group who remained at or returned to work or was hired during the period from February 25, 1954, to noon March 17, 1954, is laid off."

The contract which petitioner offered to sign also included the clauses previously agreed upon and

contained no provision for any wage increase (PA 8-9).

Characterizing petitioner's proposal as "ridiculous" and "totally unacceptable" (PA 9), Radford, in behalf of the Unions, flatly rejected the contract offer. A spokesman for petitioner suggested that he might like to have five days to think it over, but Radford emphatically stated that even though the offer remained open indefinitely, he "would never agree to it."

Petitioner then gave a week's notice to the individual employees to be laid off (R 22). The reduction in the maintenance work force was made effective on April 9, the order of retention being in accordance with the proposal which the Unions had rejected.

On April 15th or 16th, Radford telephoned, requested a conference, and petitioner asked that he "submit *any new proposal* in writing" (PA 27). On April 20, Radford wrote, proposing an agreement "which would include all clauses tentatively agreed upon prior to the strike," together with a ten-cent wage increase, and requesting a meeting "for the purpose of negotiating further on the unresolved issues" (RA 15). On April 27, petitioner replied, referring to the previous great length of the negotiations and the fact that an impasse had been reached, and declined to meet again merely for further discussions of the issues on which the impasse had developed.

The letter reads in part as follows:

> "We next heard from you on April 15, asking for a meeting to discuss 'the unresolved issues.' We told you that we do not propose to sit in a series of futile meetings repeating our respective

position *and asked that you submit any new proposal in writing.*

"You have now done so. You still propose a wage increase, although we have told you in many meetings over a period of several months that we could not grant a wage increase. You totally ignore the new issues which arose as a result of the strike. Your position is utterly unrealistic. It illustrates the futility of further meetings on questions regarding which we are apparently hopelessly in opposition.

"We are forced to reject the proposals contained in your letter of April 20. It is unnecessary to cite reasons which have been given to you so many times before.

"We see nothing to be gained in a meeting such as you propose. You know our position too well to waste your time and ours in futile discussions of previously rejected proposals" (PA 27).

The Unions did not reply (R 103), and in the following months made no new proposals nor any proposals, and did not request a further meeting (R 103, PA 28).

On February 12, 1955, petitioner approached the Unions, offering the same contracts as on April 2, 1954 (PA 53-4). The Unions replied on February 19, requesting a bargaining conference (PA 54), to which petitioner replied on February 21 (PA 29) suggesting March 3 as the date. The parties then met and petitioner again offered to sign the new contract proposed in its letter of February 12 (R 73). On March 21 (GC Ex. 25), petitioner submitted the complete contracts (GC Ex. 24a, 24b, 24c) for execution. The Unions declined to sign (GC Ex. 26). On April 7th, petitioner wrote that it was "ready and willing to execute the contracts * * *" (PA 32).

After the Board hearing in this case, and before the Board decision, one of the Unions, the Carpenters and Joiners Local 1369, requested further bargaining. Negotiations followed as a result of which petitioner and the Carpenters and Joiners, on June 22nd, agreed to and signed a contract which was the same as petitioner had offered to sign at the March 3, 1955 meeting, with a proviso that if the seniority provision relative to the returned strikers was subsequently held illegal, that paragraph would be deleted (PA 78).

Petitioner moved the Board to receive into the record the evidence of the execution of the new contract, which the Board declined to do (PA 36).

2. The Decision of the Board

The Board found that petitioner's action in assigning priority in job retention to the employees who declined to strike or returned to work before the Union directed the remaining strikers to return, was a violation of Sections 8(a)(1) and 8(a)(3), in that it resulted in including in the layoff certain employees —seven in all—who would have been retained had the seniority provisions of the expired contracts been in effect. In its decision, the Board does not contend that the layoff itself was not justified on economic grounds or that in selecting the persons for layoff, petitioner discriminated between Union and non-Union workers.[1] The Board's factual premise was that it was "not until the strike was over, and all the strikers had been put back to work" that petitioner for the first time put into a senior group for purposes of layoff the non-strikers and those who returned

[1] All of the employees were Union members under the terms of the expiring contracts and so far as the record shows none of them withdrew from membership.

before the Unions called back the strikers.[2] From this premise it reasoned that petitioner's new seniority policy was motivated "not by any legitimate economic interest of its own," but by a desire to punish the workers who engaged in a strike, and a wish to reward those who repudiated the strike. Thus viewed, the Board held that petitioner's actions amounted to a violation of Section 8(a)(3)—a discouragement of Union membership—or of Section 8(a)(1)—interference with the right to engage in concerted activities—and adopted the trial examiner's order requiring petitioner to reinstate seven of the laid off employees with back pay; and to rescind its announced seniority policy, "and to restore all employees affected thereby to the seniority they would have enjoyed absent such discriminatory policy" (PA 41).

The Board also found petitioner guilty of refusing to bargain under Section 8(a)(5). Without specifically holding that the new seniority proposal was illegal *per se*, the Board found bad faith in petitioner's adamant insistence on this clause over a period of a year—a position regarded by the Board as revealing "a bad faith resolve never to come to terms on a written agreement" (PA 39).

3. The Decision of the Court Below

On petition for review, a majority of the Court of Appeals enforced the Board order. The Court relied primarily upon a decision of another Court of

---

[2] As we shall point out in our argument, the strike was "over" in a purely figurative sense. No strike settlement or new contract had been agreed to by the Union at the time of the layoff and the Union was still pressing its demands. Accordingly, the Union order to return to work must be viewed as a temporary truce rather than a termination of the strike.

Appeals, *Republic Steel* v. *N.L.R.B.*, 114 F. 2d 820, 821, to the effect that, upon reinstatement, "the striking employees would be treated in all matters involving seniority and continuity of employment as though they had not been absent from work," a decision which it should be noted deals with the rights of *unfair labor practice strikers* and is hence distinguishable from cases involving the right of employers to replace economic strikers.

The Court's chief emphasis, however, was that during the time of the strike petitioner had made no promise to the employees who remained at work or who returned without union permission, that their employment would be permanent. The Court seized upon this fact to distinguish the *Potlatch* case (*N.L.R.B.* v. *Potlatch Forests, Inc.*, 189 F. 2d 82), on the ground that in that case the employer advocated "strike seniority" before the strike was settled and adopted that policy at the time of the settlement. The Court also noted that in *Potlatch* the replacements included some new employees, whereas here the replacements were entirely old employees. It would therefore appear that the Court of Appeals would have set aside the Board's order if petitioner had offered permanent tenure during the time the strike was in progress (PA 30).

Circuit Judge Soper dissented on the ground that the *Potlatch* case was not distinguishable in any essential feature and was a "reasonable approach to the problem under consideration."

(f) SUMMARY OF ARGUMENT

The court below and the Board have reached a result which destroys, or at least seriously impairs, the rights which this Court in the *Mackay Radio* case

(*N.L.R.B.* v. *Mackay Radio and Telegraph Co.*, 304 U.S. 333) has reserved to employers faced with a labor dispute over economic matters and a strike resulting from such a dispute.

The strikers who *en masse* returned to work on March 17 had, under the Act, a right to be reinstated to their former jobs *only* in the event that such jobs were still in existence and *only* if the petitioner had not replaced them. Because the Company had decided, prior to their return to work, for valid economic reasons, to reduce its work force by 94 jobs, it seems to be abundantly clear that the number of the returning strikers exceeded the number of available jobs by 94. When these employees, therefore, appeared on the Company's premises on March 17, without any prior notice and without any agreement having been reached settling the pending dispute between the Company and the Unions, the Company was faced with the problem of deciding which employees of the entire group would be reinstated to the available jobs and which employees would be laid off.

The Company dealt with the situation in what appears to be a very reasonable manner. Without making any announcement to the strikers or to the Unions, the Company permitted all of these returning strikers to come back into the plant. (Presumably there was a backlog of maintenance work as a result of the three-weeks strike.) Then at the next bargaining conference, held on April 2, the Company informed the Unions of the reduction in force, announced the intended date, April 9, and identified the particular strikers who returned on March 17 who would not be continued on the payroll because of this reduction. The Company, at the conference, discussed the problem

with the Unions and then, when its proposal was rejected, notified the individual employees involved of their impending lay-off.

The April 2 meeting between the Company and the Unions was a conference requested by the Unions to continue the negotiations to settle the still current labor dispute between the Company and the Unions by the execution of an acceptable agreement between these parties. In order that the seniority provision of the new contract with respect to layoffs should not grant the strikers who returned on March 17 rights to "bump" or displace other employees (including former strikers) who were on that date already at work, the Company insisted that any contract settling the current labor dispute contain a provision recognizing that the Company need not lay-off employees who were already at work on March 17 in order to make room for any of the strikers who returned on that date.

The court below and the Board have seized upon this contract provision which the Company proposed, as the sole reason for, and indeed the only evidence to support, their conclusion that the Company illegally laid-off the seven employees for whose benefit the reinstatement and back pay portions of the Board's order are directed.

The court below and the Board have focused their attention solely on the language of the Company's contract proposal dealing with the problem of the allocation of jobs available to the returning strikers on March 17, and on the discouraging effects this contract proposal might have on employees who in the future might wish to exercise their right to strike.

In giving such prominence to this contract proposal, the court and the Board have erroneously arrived at a conclusion which, contrary to the rule noted by this Court in the *Mackay Radio* case, would require the Company to allocate available jobs to returning economic strikers at the expense of non-strikers or of employees hired as replacements or of employees who had earlier abandoned the strike. Further, the Board and the court below have, by this erroneous conclusion, embarked on the even more mischievous course of endowing returning strikers with seniority rights which they clearly did not possess either before the beginning of their strike or thereafter, and which such employees had theretofore enjoyed only through their union contracts.

A. (i) It is petitioner's view that the accommodation which the court made in the *Mackay Radio* case between the employees' right to strike and the employer's right to continue its business, renders invalid the Board's order that the Company here give employment and back pay to 7 employees who returned to work on March 17, but were not reinstated to their former jobs because of the reduction in force.

(ii) The striking employees who returned to work on March 17 were, as economic strikers, entitled to be reinstated to the permanent jobs then available — i.e., the number of jobs at the beginning of the strike less the 94 jobs which the Company had, for valid economic reasons not here in issue, decided to eliminate.

(iii) The Company did not on March 17, reinstate all the strikers who returned to work on that date because there was available at that time an insufficient number of jobs to which they could be reinstated. It

was not, therefore, an unfair labor practice for the Company subsequently to advise them of the predetermined reduction in force, or to insist that the Unions, in any strike settlement agreement, recognize that the returning strikers had no right to "bump" other employees who were on the job on March 17, either as non-strikers, strikers who had earlier been reinstated, or replacements who had been hired during the strike.

B. The Board and the court below erred in drawing the inference that the Company had no "legitimate economic interest" in protecting the employees who were at work on March 17 when the Unions ordered the remaining strikers to return. It is the view of petitioner that the right of the Company to continue to operate its business by maintaining an adequate work force during a strike—the right noted by this Court in the *Mackay Radio* case—did not expire here on March 17 merely because the Unions ordered a return to work *without reaching any settlement with the Company of the labor dispute underlying the strike and without in any way abandoning the objectives of the strike.*

C. It was beyond the authority of the Board and the court below to impose upon the Company and the employees who were working prior to March 17, a seniority policy which required the reduction in the Company's work force to be made by laying off the 94 employees with least length of service on the Company's pre-strike pay-roll, regardless of the fact that some of them as a matter of law, possessed rights to be assigned to the work available inconsistent with this seniority policy of the Board.

D. Petitioner did not fail to bargain in good faith with the Unions, for its contract proposal on seniority was not repugnant to the Act. Accordingly, it had the right to insist upon its incorporation on any contract with the Unions as a method of settling the strike.

(g) THE ARGUMENT

1. Petitioner Had the Right to Retain as Permanent Employees Those Who Were Already at Work When the Rest of the Strikers Returned on March 17

The complainants were economic strikers. It is a settled principle that their only right under the Act upon their abandonment of the strike was to be reinstated to the extent that permanent jobs were then available. *N.L.R.B.* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345-5. This is the leading case and its application, until the decision of the court below, has never been judicially limited.

In the *Mackay* case, the employees in the company's San Francisco office had struck in an effort to force agreement upon a contract. The employer replaced the strikers with employees transferred from Los Angeles, promising them permanent San Francisco employment if they so desired. Five of them elected to stay. The decision involved the question whether the strikers, upon their return, were entitled to be reinstated to their old jobs then occupied by the replacements. On this question, it was said by this Court:

> ". . . Nor was it an unfair labor practice to replace the striking employees with others in an effort to carry on the business. Although Sec. 13 provides, 'Nothing in this Act shall be construed

> so as to interfere with, or impede or diminish in any way the right to strike', it does not follow that an employer, guilty of no act denounced by the statute, has lost the right to protect and continue his business by supplying places left vacant by strikers. And he is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them."

In this case, as already seen, the Company before the strike, had decided to reduce the maintenance work force in the near future by eliminating 94 jobs. Thus, on March 17, the date the strikers returned to work en masse under union direction, there were not a sufficient number of jobs available to assure permanent tenure to all the economic strikers. Therefore, it follows that the Company had a right to assign the individual strikers respectively to permanent jobs and temporary jobs on any basis of choice not forbidden by law.

The method petitioner used was to consider all the employees who had remained at work or come back to work before March 17 as already filling permanent jobs, and then to allocate the remaining strikers to permanent jobs in the order of their respective lengths of service until all such jobs were exhausted. The balance of the men were assigned to temporary jobs.

According to the Board, however, it was discriminatory to treat the first group of employees as having permanent tenure, to the exclusion of any of the later returning strikers who might formerly have outranked them on the old seniority list. As we shall hereafter point out, there being no contract in effect at this time, there were no existing seniority rights.

The rights of returning strikers were governed by the principles enunciated by this Court in the *Mackay* case.

The court below attempted to distinguish that case on the ground that here the employees who repudiated the strike had been given no assurance of permanent employment. We submit this makes no difference. What the court overlooked were the numerous Board decisions holding that strike replacements will be deemed permanent replacements unless there is affirmative evidence that they were hired only temporarily. Thus, in *Union Bus Terminal of Dallas, Inc.*, 97 NLRB 206, 208, the Board held that the places of returning economic strikers had been filled, *because "there is no evidence to show that such replacements were not permanent."*

In *Columbia Pictures Corporation*, 64 NLRB 490, 516, a striking union challenged the ballots of a group of employees in a set decorators unit on the ground that they had merely been temporarily employed after the regular employees in the unit had been called out on strike. Many of the replacements were not new employees but had simply been transferred to the unit from other jobs in the same company. Although no promise of permanent tenure had been given any of the replacements, the Board overruled the challenges by noting that "no limitation was placed upon the tenure of any of the replacements when they were assigned to their duties as decorators."

The court below also avoided the application of the *Mackay* doctrine by suggesting that until the strike was over, there was no determination to replace the strikers. The record establishes the contrary. When

the local management saw that the production crew had remained at work and that there was reasonable hope of continuing the plant in operation, they determined to continue production. To do this, it was necessary to replace the strikers in the needed jobs. This they determined to attempt. They accordingly notified the Unions, while the strike was still in progress, that they would proceed to interview applicants to fill the needed jobs left vacant by the strikers (PA 22).

Thus it is clear that permanent replacement of the strikers was an overall policy, in which the return of some of the strikers was a mere incident. True, the strike was halted—at least temporarily—before any new employee replacements had been obtained, but the replacements actually made might just as well have been new employees as returned strikers. But for the sudden return of the remaining strikers to work, new employees would almost certainly have been obtained, with permanent job tenure. Surely there would be no reasonable ground for requiring disparity in treatment as between such new employees on the one hand and the non-strikers and already returned strikers on the other.

Had the company attempted to discriminate in terms of job tenure, as long as permanent openings were available, between newly hired employees and old employees who repudiated the continuation of the strike, it would clearly have been guilty of an unfair labor practice. *Polish National Alliance* v. *N.L.R.B.*, 136 F. 2d 175 (CA 7). Thus the employees who reported for work before the strike was discontinued were entitled to the status of "new" replacements, i.e., permanent jobholders, unless (as was not the

case here) "some limitation was placed upon their tenure . . . when they were assigned to their duties . . .", *Columbia Pictures Corporation, id., supra.*

The case of *N.L.R.B.* v. *Potlatch Forests, Inc.*, 189 F. 2d 82 (CA 9), holds that the *Mackay* doctrine is equally applicable to the same facts as in this case. In the *Potlatch* case, as here, the employer treated old employees who abandoned the strike as permanent replacements, though they had been given no promise of such tenure when they disregarded their union's instructions and returned to work. The employer there adopted exactly the same basis as petitioner for determining retention order of employees in the event of a layoff. It was said by the court:

> "The record here does not disclose that Potlatch in fact assured the replacements that 'their places might be permanent'; however, that assurance need not be proved. The Supreme Court in the Mackay Radio case was concerned not so much with an explicit promise of permanent tenure as with the propriety of the employer's concern for that tenure. In this case Potlatch advocated 'strike seniority' before the strike was settled, adopted that policy at the time of settlement and has consistently maintained that policy at all times thereafter. Potlatch has, since prior to the settlement of the strike, endeavored to make the places of the replacements as nearly permanent as may be. The propriety of this concern was settled in the Mackay Radio case."

It is true in the instant case that at the time the strikers returned to work the Company had not as yet formally designated the positions in the maintenance unit which it intended to continue in its job structure, nor had it designated which positions it

intended to eliminate. This, however, is scarcely a distinguishing feature from *Potlatch* for, as we have seen, there being a surplus of permanent jobs here prior to March 17, the employees who repudiated the strike were clearly entitled to fill such vacancies when they applied for reinstatement.

Commenting upon a similar situation, the Court of Appeals for the Ninth Circuit in *Potlatch* observed:

> "While the Mackay Radio case can be formally distinguished on the ground that the Supreme Court in that case was considering a shortage of jobs at the time the strike was settled, rather than a shortage caused by a later curtailment of activities, the assurance of permanent employment in the latter event is equally justifiable."

It is submitted that the fact that on the day the strikers returned petitioner did not inform them whether or not their assignments were permanent or temporary, does not alter the legal situation in the light of the foregoing judicial holdings. The strikers had returned without notice and as there was presumably a backlog of maintenance work which had accumulated during the strike, management obviously could not have effectuated the contemplated layoff instantly. The record does show, however, that within the next 12 days—when it was known just which strikers had returned — the proposed seniority list to govern the layoff was prepared. Before putting the plan into effect the Company disclosed it to the Unions in a good faith attempt to gain their acquiescence.

Despite these well established legal principles, the Board condemns petitioner's course of action by declaring that the inevitable result of petitioner's

seniority policy was to penalize the strikers who remained out longest, thereby discouraging the exercise of their rights under Section 7 and 8(a)(1) of the Act to engage in future strikes.

Conceding that some incidental discouragement as to future strikes may have been involved, that fact nevertheless does not deprive the employer of his right to replace economic strikers, nor the replacements of their right to permanent tenure. Consider the converse case. For analysis, let it be assumed that the Company yielded to insistence by the Unions and displaced the non-strikers and returned strikers in order to make more jobs available for the remaining strikers; that the employees so laid off were the complainants here. Would they not have a perceptibly stronger case than the present complainants. Could they not effectively contend that they had been discriminated against for the purpose of discouraging their exercise of *their right to refrain from striking* because they were not reinstated to the permanent jobs then available. ("Sec. 7. Employees shall have the right . . . to engage in other concerted activities for the purpose of . . . other mutual aid or protection, and *shall also have the right to refrain from any and all such activities.*")

As a basic interpretation of the Act, we understand the general doctrine of *Mackay* to be that where the primary motivation of an action in labor relations is otherwise legal, the fact that the particular action may incidentally tend to discourage the exercise of rights guaranteed in Section 7 does not thereby render the action illegal. *Mackay* holds that the employer may replace economic strikers during the strike and is not obliged to displace such replacements at the end of

the strike in order to provide jobs for the returning strikers. It is obvious that such action would tend to discourage the exercise of the right to strike. The awareness of employees that by engaging in an economic strike they may lose their jobs to replacements must necessarily make them more loath to engage in a strike than would be the case if they were assured that the employer must keep their jobs available during the strike and reinstate them therein at the end.

Yet if the employer makes the replacements in "an effort to carry on the business", or "to protect and continue his business, by supplying places left vacant by the strikers", then he has the right to give the replacements permanent tenure of the jobs and to decline to reinstate the strikers therein.

The doctrine has been given well established application in other areas besides reinstatement of economic strikers. A "no strike" clause may legally be included in a contract. Here it is apparent that a more direct restraint upon the exercise of the right to strike could not well be imagined. Yet it is well established that by agreement between the employer and the bargaining representatives, this restraint may be legally imposed and will be enforced by the courts. *N.L.R.B.* v. *Sands Mfg. Co.*, 306 U.S. 332.

Another facet of the *Mackay* doctrine is illustrated by *Kansas Milling Co.* v. *N.L.R.B.*, 185 F. 2d 413, 420, where the court pointed out that management has no duty to warn economic strikers in advance of their return to work that they "might be out of a job", declaring that in an economic strike the company had a right without notice to replace the strikers with other permanent employees.

2. The Board and the Court Below Erred in Finding That the Unions Had Terminated Their Strike Before the Layoff List Was Announced

As noted in our "Statement", the Board's underlying premise in drawing its inference of punitive motivation on petitioner's part was that the strike was "over" and the strikers had been put back to work at the time the new seniority lists were drawn. Hence the Board contended the Company had no "legitimate economic interest" in protecting the employees who had repudiated the strike. The trouble with this reasoning is that the factual premise is inaccurate in two respects:

(1) It ignores the fact that inasmuch as a determination to reduce the maintenance force by 94 jobs had been made *before the strike*, there were simply not a sufficient number of permanent jobs available on March 17 (when the Unions told the remaining strikers to return) to take care of all the strikers. We have pointed out that the employees who remained at work or who had previously abandoned the strike—like new replacements—had a prior claim to these jobs in the absence of any notice limiting their tenure, and hence the strikers who remained out were entitled only to what residue was available when they applied for reinstatement.

(2) At the time the layoff list was drawn (on or about March 29) and the layoffs announced (April 2), the strike was not "over" in the sense that it had been settled. All that had occurred was that the strikers who had not previously abandoned the strike, were sent back to the plant on March 17 by Radford, the Unions' leader. But as the latter made clear in his

letter of March 29, he had directed the striking employees to return "without any agreement whatsoever". Thus the Unions on all the crucial dates (March 29, April 2, and April 9) were free to resume the strike whenever it suited their purpose. In fact, Radford in the same letter referred to "unresolved issues" and made a thinly veiled threat to renew the strike unless concessions were forthcoming, stating "the alternatives which we may pursue are very limited".

The setting of petitioner's actions on March 29 and April 2, consequently, was entirely different from the situation depicted by the Board. The dispute which had caused the strike was still current. The Unions had neither accepted the employer's last pre-strike proposal nor withdrawn any of the demands which the strike was undertaken to enforce. In fact, as late as April 20, the Unions in a letter were still pressing for a wage increase, albeit, a smaller one than their original demand. No settlement agreement had been made nor had the terms of a new contract been agreed upon. Under these circumstances if the Unions had a legal right, as the Board seems to think, to insist that the layoff should have been made on the basis of the old seniority list under the expired contracts, the employees who had remained on strike until the Unions' decreed otherwise could have "bumped" both new and old replacements if they had enjoyed earlier preference on the seniority ladder under the old contracts.

Then if petitioner had not acceded to the Unions' terms, there was nothing to prevent them from resuming the strike, leaving petitioner with only a handful of the workers who had previously repudiated

the strike and gone back to work. Needless to say, if these employees had received such treatment, petitioner's chances of finding a maintenance crew either through new or old replacements, in event of another strike, would have been slender indeed.

Under these circumstances, it is difficult to understand how the Board could have concluded that Plant Manager Wright's expressed intention to give whatever job security he could, was not justified by "legitimate economic interest". Unless he could do this, management's ability to continue operations would have been severely impaired in the event the Unions decided to end their temporary armistice.

Something might be said for the Board's position had the Unions returned the men to work under the terms of a new contract. Then, had management at some later date decided upon a layoff and placed the strikers at the bottom of the retention list, there would be some basis for an inference that petitioner was either being vindictive against the strikers or was punishing them as a deterrent to another strike, should an impasse ensue in the next contract negotiating period. This, however, was not the setting within which petitioner acted.

Unfortunately upon judicial review the Court of Appeals also adopted the Board's erroneous factual assumption that the strike had been permanently ended. As a result the court failed to perceive that the factual situation in this case was on all fours with that in the *Potlatch* case, *supra*. It distinguished this case from *Potlatch* primarily on the ground that there the employer, although having given no assurance of super-seniority to the replacements,

insisted in the discussion concerning strike settlement that such a policy be followed with respect to layoffs, whereas here the new seniority policy was not mentioned "until the strike was over and the strikers had *returned* to work."

But what the court failed to perceive was that in this case, there having been no strike settlement, the strike was not really terminated in any fundamental sense. A mere truce had occurred, and in the first conference (April 2) looking to a strike settlement, petitioner, like the employer in the *Potlatch* case, immediately proposed that the union recognize its strike seniority policy as a part of that settlement.

Thus, when the record in this case is examined it becomes apparent that there is no relevant factual distinction between the two cases.[3]

---

[3] The Board also seems to give some weight to the fact that the matter of relative seniority was never mentioned to any of the employees during the strike (PA 37). The Board appears to have overlooked its own rule. Had petitioner expressly offered such an inducement for abandoning the strike to the workers, the Board under its current decisions would have attacked such an offer as an unfair labor practice. The Trial Examiner in his opinion here points this out, citing *Dinion Coil Co., Inc.*, 110 NLRB 196, for the proposition that a threat to withdraw "seniority credits" during an economic strike was an unfair labor practice (PA 62). The Board in its annual reports has stated that it recognizes the right of employers to solicit a return to work by economic strikers only if the solicitation is not accompanied by any promise of benefits. Nineteenth Annual Report of N.L.R.B., p. 78. See *American Rubber Products Co.*, 106 NLRB 73; *Texas Co.*, 93 NLRB 1358, 1362.

3. None of the Employees Had Any Seniority Rights Because the Contracts Had Expired and the Board's Order Imposing Its Own Seniority Policy Upon Petitioner Is Beyond Its Authority

The basic fallacy in the Board's approach to this controversy is illustrated by the way it framed its remedy. Its order is based on the assumption that the employees at the time of the strike and thereafter enjoyed certain seniority rights, when in fact, the contracts conferring such rights upon them had expired on February 10, 1954, several days before the strike began.

As we read the decisions, employees acquire no seniority rights absent a contract providing them. Without such provisions, the employer may operate without employee seniority or may adopt any seniority provisions which are not in violation of the law. In the case here, owing to the previous expiration of the old contracts, no seniority provisions existed until the Company adopted the provision complained of.

The Board directs the Company to rescind "its discriminatory seniority policy" and to "restore all employees affected thereby to the seniority they would have enjoyed absent such discriminatory policy." How is the Company to determine "the seniority they would have enjoyed." The Board does not, and obviously cannot, formulate and impose a seniority policy. The law prescribes none. There is no contract.

In *Aeronautical Industrial District Lodge 727* v. *Campbell,* 337 U.S. 521, 526, a returning veteran seeking replacement in his job pursuant to the provisions of the Selective Service Act, claimed seniority rights with respect to layoff beyond those provided in the applicable collective bargaining agree-

ment. Specifically, the agreement provided super-seniority for union chairmen. The veteran had a greater length of service with the employer than some of the union chairmen. When a layoff occurred, these chairmen were retained and the veteran was laid off. It was said by this Court:

> "In providing that a veteran shall be restored to the position he had before he entered the military service 'without loss of seniority,' § 8 of the Act uses the term 'seniority' without definition. *It is thus apparent that Congress was not creating a system of seniority but recognizing its operation as part of the process of collective bargaining.* We must therefore look to the conventional uses of the seniority system in the process of collective bargaining in order to determine the rights of seniority which the Selective Service Act guaranteed the veteran.
>
> "Barring legislation not here involved, *seniority rights derive their scope and significance from union contracts,* confined as they almost exclusively are to unionized industry. See Trailmobile Co. v. Whirls, 331 U.S. 40, 53, note 21, 67 S. Ct. 982, 988, 91 L. Ed. 1328."

In *Elder* v. *New York Central Railroad Company* (CA 6), 152 F. 2d 361, 364, the employee contended that by the employer's refusal to reinstate him as clerk, pursuant to a collective bargaining agreement which deprived him of all seniority rights, "he had been deprived unlawfully of a legally constituted seniority right." The Court's analysis of the source and nature of seniority rights we think is equally applicable to the case here. It was said by the Court:

> "The seniority right of the man who toils, indoors or out, in a shop or in an office, is a most valuable

> economic security, of which he may not be unlawfully deprived. The right, however, is not inherent. * * * In the absence of statute, mere employment independent of the contractual conferring of special benefits upon those who have longest service records with the individual employer, creates no rights of seniority in retention in service or in reemployment. In the instant case, the appellant rests upon no right created by statute, but solely upon a collective bargaining agreement, made between the chosen representative of the workers and the employer. * * *
>
> "As was pointed out in System Federation No. 59 of Railway Employees Department of American Federation of Labor v. Louisiana & A.R. Co., 5 Cir., 119 F. 2d 509, 515, *the authorities are uniform to the effect that collective bargaining agreements do not create a permanent status, give an indefinite tenure, or extend rights created and arising under the contract beyond its life,* when it has been terminated in accordance with its provisions."

The Board notes in its decision (PA 37) that seniority under the old contracts provided "the only layoff system shown by the record to be in effect at respondent's plant prior to the advent of super-seniority." This fact seems irrelevant, in view of the fact that the old contracts had expired and that the seniority rights existing thereunder did not extend "beyond the life" of such contracts.

It seems apparent that only the Company had the right to determine which of the surplus employees were to be displaced on account of the reduction in the number of available jobs. It further seems clear that the Company, in making this determination, is

left to any method of choice not denounced by law. In *Mackay* (304 U.S. at p. 347) (like this, a non-contract case), it was said by this Court:

> "As we have said, the respondent was not bound to displace men hired to take the strikers' places in order to provide positions for them. It might have refused reinstatement on the grounds of skill or ability, but the Board found that it did not do so. It might have resorted to any one of a number of methods of determining which of its striking employees would have to wait because five men had taken permanent positions during the strike, but it is found that the preparation and use of the list, and the action taken by respondent, was with the purpose to discriminate against those most active in the union."

4. Petitioner Did Not Refuse to Bargain in Good Faith

The Board's primary ground for its finding of refusal to bargain was its view that petitioner could not in good faith insist upon the Unions' acceptance of its proposal on the point of recognition of permanent tenure, because petitioner could not legally assign that tenure to the employees in question. In other words, the Board seems to imply that because, in its opinion, petitioner's job retention policy was discriminatory under Section 8(a)(1) and 8(a)(3), it was not entitled to insist upon this proposal to the point of impasse.

If this is the Board's rationale, the validity of its Section 8(a)(5) finding against petitioner would seem to depend upon whether or not petitioner's layoff policies were illegal, *per se*. Consequently, if this Court agrees with us that such policies and the action taken to implement them, did not violate either Section

8(a)(1) or 8(a)(3) of the Act, we submit that the finding that Section 8(a)(5) was violated cannot stand.

Inasmuch as the Board abstained from any specific finding that petitioner's proposal was illegal, *per se*, and advanced some other considerations as supporting its ultimate conclusion that petitioner had failed to bargain in good faith, a few words about this aspect of the case seem appropriate.

The Board found that the Company's insistence upon including its permanent tenure proposal in the new contract demonstrated its

> "bad faith resolve never to come to terms on a written agreement. *Viewed against this background,* the respondent's other responses to the Unions' attempts to continue bargaining conferences gain added significance as revealing an outright decision to refuse to bargain" (PA 39).

The court below said that the Board found

> ". . . upon the basis of the entire course of bargaining *and particularly in view of the company's insistence* upon super-seniority for non-strikers or returning strikers . . ."

that petitioner had refused to bargain collectively in good faith.

The Company was not required to yield upon its "superseniority" proposal unless it was without legal standing in advancing the proposal. Section 8(d) of the Act specifically provides that the obligation to bargain "does not compel either party to agree to a proposal or require the making of a concession."

We respectfully submit that in making these observations the Board disregarded the admonition of this Court that it is "clear that the Board may not either directly or indirectly compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements." *N.L.R.B.* v. *American National Insurance Co.*, 343 U.S. 395, 404.

The notion that an employer cannot insist upon a particular contract proposal merely because the Board views it as unreasonable has been repeatedly disapproved by the courts. In *N.L.R.B.* v. *Corsicanna Cotton Mills* (CA 5), 179 F. 2d 234, 235, the Court stated:

> "The freedom to negotiate is no less a basic right of an employer than of employees. * * * The law does not authorize the National Labor Relations Board or the courts to make collective bargaining contracts or to prescribe what shall be written into them. *Neither the courts nor the Board may interfere in negotiations as long as they are being carried on in good faith.*"

To the same effect, see *N.L.R.B.* v. *Whittier Mills Company* (CA 5), 123 F. 2d 725.

In *N.L.R.B.* v. *I.B.S. Mfg. Co.* (CA 5), 210 F. 2d 634, 33 LRRM 2583, it was held that an employer's demand for a union performance bond was not a refusal to bargain in violation of the Act. In reversing the Trial Examiner's finding that the employer had not refused to bargain, the Board stated:

> "At the July, 1949 conference, the Respondents refused to state that they were not still insisting on such a performance bond as a condition precedent to an agreement. Instead, by asserting

> that the cases holding such insistence to be unlawful were not controlling, the Respondents clearly revealed that a performance bond was still a condition precedent to an agreement. By such insistence, we find that the Respondents violated Section 8(a)(5) and (1) of the Act."

The Court in reversing the Board's ruling on this point stated:

> "We have not compelled, we will not compel, an employer to agree to a particular provision of a contract. It is necessary that the courts make it clear that a finding of good faith in bargaining cannot be based upon whether a particular provision seems reasonable or unreasonable to the board, or whether the board thinks the provision should be agreed to. It must be based entirely upon a consideration of the negotiations as a whole and upon a judgment based not upon the proposal or rejection of a particular proposition but upon clear proof derived from evidence and not from suspicion and conjecture that the Respondent had not intended to bargain and had not bargained in good faith, that is, that the Respondent had no wish for an agreement but rather a wish to the contrary, and had conducted itself so as to defeat rather than promote agreement."

With respect to the Board's finding of a "bad faith resolve never to come to terms on a written agreement" (PA 39), we point out first that the finding was necessarily erroneous because petitioner actually signed a contract with one of the Unions before the Board's decision. It is true that the Board rejected the evidence of this fact, but it seems to be clearly pertinent, particularly in view of the language of the

Board's finding. The authorities cited by the Board for rejecting appear to us to have no bearing.

Aside from this are the facts that the court below found that petitioner has no anti-Union background, that its bargaining history with the Unions showed agreement upon contracts containing the favorable provisions generally sought by unions, and that it bargained frequently with the Unions over a period of several weeks before and during the strike (PA 12) in what the Board does not deny was a bona fide effort to reach an agreement. The bargaining after the strike encountered the impasse upon the permanent tenure provision. Agreement was reached upon all other points of a new contract, *which the Company offered to sign.*

With regard to the Board's finding that the Company "rejected" the Unions' request of March 15, 1954, for a collective bargaining meeting by suggesting that their proposal be made through the Federal Mediation and Conciliation Service (PA 39), the Board must have overlooked Radford's letter of March 23, 1954 (PA 23), saying that petitioner's representatives on March 15, 1954 advised him "to relay my proposal of *resuming negotiations* to Mr. William Rose of the Federal Mediation and Conciliation Service." Surely since Mr. Rose had participated in the negotiations up to that point, it was only natural for petitioner to recognize Mediation's participation in the negotiations by requesting that the date of the conference be fixed through him, so as to be sure of his convenience.

Moreover, it seems clear that petitioner's request after the impasse had developed, "that the Unions' proposal be submitted in writing" (PA 39), was a

reasonable measure to ascertain whether the Unions had changed their position on any material point. We think that it is a commonplace of collective bargaining that when an impasse has been reached, either party is entitled to decline to meet again until the other gives assurance that it is willing to change its position, thus avoiding the "Marathon discussions" which this Court referred to in the *American National Insurance Co.* case, *supra.* The same observation applies to the Board's finding that petitioner on April 27 "refused still another invitation to bargain" (PA 39).

Thereafter, the Unions made no further request for a conference and petitioner took the initiative in seeking a subsequent conference, which was held.

It seems clear that these facts neither singly nor as a whole justify a finding of refusal to bargain.

(h) CONCLUSION

WHEREFORE, in the light of the foregoing considerations, we request this Court to reverse the order of the court below with instructions to set aside the order of the Board and to deny the Board's cross petition for enforcement.

Respectfully submitted,

WM. A. STUART
188 East Main Street
Abingdon, Virginia
Counsel of Record
for Petitioner

H. W. STULL
Olin Mathieson Chemical Corporation
460 Park Avenue
New York 22, New York
Of Counsel

INDEX

	Page
Opinions below	1
Jurisdiction	1
Statute involved	2
Questions presented	2
Statement	3
I. The facts	3
A. Petitioner's discrimination against strikers	3
B. Petitioner's refusal to bargain in good faith	5
II. The Board's conclusions and order	6
III. The decision below	8
Summary of argument	10
Argument	13
I. The Board and the court below properly found that petitioner's seniority policy, favoring employees who abandoned the strike or did not participate in it, was discriminatory within the meaning of the Act and in violation of Section 8 (a) (3) and (1)	13
II. Substantial evidence supports the Board's finding that petitioner violated Section 8 (a) (5) and (1) of the Act by refusing to bargain in good faith with the unions representing its employees	28
Conclusion	30
Appendix	31–33

CITATIONS

Cases:

Allen-Bradley Local v. *Wisconsin Employment Relations Board*, 315 U. S. 740	15
Amalgamated Association v. *Wisconsin Employment Relations Board*, 340 U. S. 383	13
American Rubber Products Corp. v. *National Labor Relations Board*, 214 F. 2d 47	21
Associated Press v. *National Labor Relations Board*, 301 U. S. 103	19

412799—57——1

Cases—Continued

	Page
Berkshire Knitting Mills v. *National Labor Relations Board*, 139 F. 2d 134	24
Betts Cadillac Olds, Inc., 96 NLRB 268	24
Carter Carburetor Co. v. *National Labor Relations Board*, 140 F. 2d 714	26
Collins Baking Company v. *National Labor Relations Board*, 193 F. 2d 483	24
Cusano v. *National Labor Relations Board*, 190 F. 2d 900	24
Dinion Coil Co., Inc., 110 NLRB 196	21
Duluth Bottling Assn., 48 NLRB 1335	24
Firth Carpet Co. v. *National Labor Relations Board*, 129 F. 2d 633	22, 26
Home Beneficial Life Ins. Co. v. *National Labor Relations Board*, 159 F. 2d 280, certiorari denied, 332 U. S. 758	22, 26
Idaho Potato Growers v. *National Labor Relations Board*, 144 F. 2d 295	25
International Shoe Co., 93 NLRB 907	24
International Union, U. A. W. v. *O'Brien*, 339 U. S. 454	13, 15
Mastro Plastics Corp. v. *National Labor Relations Board*, 350 U. S. 270	14
McQuay-Norris Mfg. Co. v. *National Labor Relations Board*, 116 F. 2d 748	25
National Labor Relations Board v. *Andrew Jergens Co.*, 175 F. 2d 130	29
National Labor Relations Board v. *Babcock & Wilcox Co.*, 351 U. S. 105	15
National Labor Relations Board v. *Bailey Co.*, 180 F. 2d 278	18
National Labor Relations Board v. *Bradley Washfountain Co.*, 192 F. 2d 144	21
National Labor Relations Board v. *Clausen*, 188 F. 2d 439, certiorari denied, 342 U. S. 868	23
National Labor Relations Board v. *Corsicana Cotton Mills*, 178 F. 2d 344	28
National Labor Relations Board v. *Crown Can Co.*, 138 F. 2d 263, certiorari denied, 321 U. S. 769	18
National Labor Relations Board v. *Dalton Telephone Co.*, 187 F. 2d 811, certiorari denied, 342 U. S. 824	28

Cases—Continued

Page

National Labor Relations Board v. *Fansteel Metallurgical Corp.*, 306 U. S. 240 15
National Labor Relations Board v. *Gaynor News Company*, 197 F. 2d 719, affirmed, 347 U. S. 17 .. 12, 14, 25, 26
National Labor Relations Board v. *Gittlin Bag Company*, 196 F. 2d 158 29
National Labor Relations Board v. *Gluek Brewing Co.*, 144 F. 2d 847 25
National Labor Relations Board v. *Good Coal Co.*, 110 F. 2d 501 26
National Labor Relations Board v. *International Rice Milling Co.*, 341 U. S. 665 ..... 13, 14
National Labor Relations Board v. *Jacobs Mfg. Co.*, 196 F. 2d 680 29
National Labor Relations Board v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333 ..... 9, 11, 13, 16, 17, 18, 21, 22, 25
National Labor Relations Board v. *McCatron*, 216 F. 2d 212, certiorari denied, 348 U. S. 943 25
National Labor Relations Board v. *National Broadcasting Co.*, 150 F. 2d 895 25
National Labor Relations Board v. *National Shoes, Inc.*, 208 F. 2d 688 ..... 28, 29
National Labor Relations Board v. *Pecheur Lozenge Co.*, 209 F. 2d 393, certiorari denied, 347 U. S. 953 .. 28
National Labor Relations Board v. *Polson Logging Co.*, 136 F. 2d 314 25
National Labor Relations Board v. *Potlatch Forests, Inc.*, 189 F. 2d 82 ..... 9, 19
National Labor Relations Board v. *Reed & Prince Mfg. Co.*, 205 F. 2d 131, certiorari denied, 346 U. S. 887 .. 28
National Labor Relations Board v. *Remington Rand, Inc.*, 130 F. 2d 919 26
National Labor Relations Board v. *Sands Mfg. Co.*, 306 U. S. 332 15
National Labor Relations Board v. *Sandy Hill Iron and Brass Works*, 165 F. 2d 660 26
National Labor Relations Board v. *Shenandoah-Mining Co.*, 145 F. 2d 542 23
National Labor Relations Board v. *Stackpole Carbon Co.*, 103 F. 2d 167 26

Cases—Continued

Page

National Labor Relations Board v. *Star Publishing Co.*, 97 F. 2d 465 25
National Labor Relations Board v. *James Thompson & Co., Inc.*, 208 F. 2d 743 21
National Labor Relations Board v. *Tower Hosiery Mills*, 180 F. 2d 701, certiorari denied, 340 U. S. 811 28
National Labor Relations Board v. *Trojan Powder Co.*, 135 F. 2d 337 24
National Labor Relations Board v. *United States Cold Storage Corp.*, 203 F. 2d 924 29
National Labor Relations Board v. *Waterman S. S. Corp.*, 309 U. S. 206 28
National Labor Relations Board v. *West Coast Casket Co., Inc.*, 205 F. 2d 902 18
Radio Officers Union v. *National Labor Relations Board*, 347 U. S. 17 ..... 13, 18, 27
Republic Aviation Corp. v. *National Labor Relations Board*, 324 U. S. 793 15
Southern Steamship Co. v. *National Labor Relations Board*, 316 U. S. 31 15
Texas Company, The, 93 NLRB 1358 21
Western Cartridge Co. v. *National Labor Relations Board*, 134 F. 2d 240, certiorari denied, 320 U. S. 746 18
Wilson & Co., Inc. v. *National Labor Relations Board*, 123 F. 2d 411 25

Statute:

National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*):
Section 2 (3) 13, 16, 22, 31
Section 2 (9) 31
Section 7 ..... 7, 11, 13, 15, 31
Section 8 (a) (1) 2, 7, 10, 11, 13, 28, 32
Section 8 (a) (3) 2, 7, 10, 11, 13, 26, 27, 32
Section 8 (a) (5) 2, 7, 28, 32
Section 8 (b) (4) 15
Section 8, (c) 18
Section 8 (d) 15
Section 10 (a) 32
Section 10 (c) 32
Section 13 ..... 11, 13, 33

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 153

OLIN MATHIESON CHEMICAL CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court below (R. 25–34)[1] is reported at 232 F. 2d 158. The findings of fact, conclusions of law, and order of the National Labor Relations Board (P. A. 36–76) are reported at 114 N. L. R. B. 486.

JURISDICTION

The judgment of the court below was entered on April 9, 1956 (R. 33). The petition for a writ of

[1] The record consists of the proceedings in the court below and the appendices to the briefs of the petitioner and the Board below which are designated, respectively, "P. A." and "B. A." The proceedings in the court below, which follow numerically the Board's appendix below, are designated "R."

certiorari was filed on June 9, 1956, and was granted on October 8, 1956 (R. 34). 352 U. S. 819. The jurisdiction of this Court rests on 28 U. S. C. 1254 and Section 10 (e) of the National Labor Relations Act, as amended.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*), are appended *infra*, pp. 31–33.

QUESTIONS PRESENTED

1. After the termination of an economic strike, petitioner adopted and implemented a seniority policy whereby the employees who did not participate in the strike, or who abandoned the strike and returned to work, were, for purposes of layoffs, accorded seniority over the employees who remained out until the strike was concluded. The first question presented is whether this course of action by petitioner discriminated against the latter group of employees within the meaning of the Act and in violation of Section 8 (a) (3) and (1).

2. Whether substantial evidence supports the Board's finding that petitioner, in violation of Section 8 (a) (5) and (1) of the Act, failed to bargain in good faith with the unions representing its employees, particularly in view of its insistence upon incorporating in a collective bargaining agreement the seniority policy referred to in Question No. 1.

STATEMENT

I. THE FACTS

A. PETITIONER'S DISCRIMINATION AGAINST STRIKERS

From February 24 to March 17, 1954, a number of petitioner's 234 maintenance employees engaged in a peaceful strike to support the position of their bargaining representatives[2] in contract negotiations (P. A. 46–47; 4–7, 20). Although petitioner hired no new employees, its plant continued to operate with a work force of employees who remained at work and strikers who returned to work of their own accord during the course of the strike (P. A. 51, n. 5, 61, 63; 16, B. A. 22). When the Unions called off the strike on March 17, petitioner reinstated the remaining strikers (P. A. 48; 7–8).

Prior to the strike, petitioner had decided, for economic reasons, to lay off 94 maintenance employees. As of the end of the strike, however, it had not yet selected the particular employees to be laid off (P. A. 37; 19, B. A. 10). A few days before March 29, petitioner's plant manager recommended to his superiors that those employees who had remained at work, or who had returned during the strike, should,

[2] The maintenance employees were represented by three unions: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 152, AFL; United Brotherhood of Carpenters and Joiners of America, Local 1369, AFL; and International Brotherhood of Electrical Workers, Local 425, AFL (herein collectively called the Unions).

if possible, be retained in the work force because petitioner "owed these men an obligation for as much job security as possible" (P. A. 37, 61; 16). Thereafter, at an April 2 bargaining session with the Unions, petitioner for the first time proposed that the following clause be incorporated in the seniority provisions of the contract under negotiation (P. A. 37, 50; 8–9, 25):

> Anything in this Article IV on seniority to the contrary notwithstanding, employees in the journeymen classification and employees in the Helper Classification within a Work Group covered by this Contract who were not at work from February 25, 1954, until at or after noon on March 17, 1954 [the initial and terminal dates of the strike], shall be laid off before any employee so classified in the same Work Group who remained at or returned to work or was hired during the period from February 25, 1954, to noon March 17, 1954, is laid off.

At the same time, petitioner further announced an imminent layoff of 94 maintenance men to be selected on the basis of the foregoing seniority proposal. (P. A. 37, 50; 8–9). When the Unions objected strongly to such a policy and said they could "never agree to it" (P. A. 50, 9, B. A. 8), petitioner's spokesman replied that he "felt that the ones that come across the picket line, and so forth, deserved * * * a little something for helping support the breaking [of] the strike" (P. A. 37, 63; B. A. 8). In explaining, at a subsequent bargaining conference with the Unions in March 1955, petitioner's insistence upon superseniority for these employees, petitioner's attorney stated (P. A. 37, 61, 63; B. A. 22): "I think the thing that

counts is loyalty to the job and keeping this facility running. Many realize this plant has shut down before and they don't want to see that happen again."

Pursuant to this superseniority policy, the maintenance employees laid off on April 9, 1954, included seven full-term strikers (the complainants in this case) who were senior in point of service to a corresponding number of retained employees who had returned to work before the end of the strike (P. A. 37; 2–3). The complainants would not have been laid off if petitioner had followed the system for layoffs prevailing prior to April 2, 1954, under expired contracts with the Unions (P. A. 37; 2–3).

B. PETITIONER'S REFUSAL TO BARGAIN IN GOOD FAITH

When the strike interrupted contract negotiations on February 24, 1954, petitioner and the Unions had reached agreement on many issues, but other matters, primarily wage rates, remained unsettled (P. A. 47; 5, 19–21, 26). Thereafter, on March 15, 23, and 29, the Unions requested a resumption of negotiations (P. A. 48–50; 23–24, B. A. 3, G. C. Exh. 13, R. 52–54). After first replying that the Unions should make their proposals through the Federal Mediation and Conciliation Service, petitioner finally agreed to meet on April 2 (P. A. 48, 50; 23–25, B. A. 3, R. 52–55). At this meeting, petitioner offered to sign contracts containing all provisions agreed upon prior to the strike if the Unions would agree to the superseniority clause set forth *supra*, p. 4 (P. A. 50; 8–9, 25, B. A. 10). Despite the Unions' vigorous objections to the superseniority proposal, petitioner, a few days later, effected

412799—57——2

a layoff in accordance with this policy (P. A. 50–51; 2–3, 9). Shortly thereafter, petitioner refused to meet with the Unions, stating that if the Unions had any proposals to make they should submit them in writing (P. A. 51; 26–27, B. A. 15). When the Unions subsequently submitted written proposals, petitioner rejected them, stating that it would not recede from its superseniority policy or from its refusal to grant any wage increase, and it refused to meet further with the Unions on the ground that this would be "futile" (P. A. 51–52; 10, 26–27, B. A. 15). The parties again met about ten months later, on March 3, 1955, after the Unions had filed charges initiating the instant unfair labor practice proceedings. Although the parties were in agreement on all other issues, petitioner still insisted upon incorporating its superseniority policy in any contract (P. A. 53, 54; 11, 28–29, 30–33, 35–36, B. A. 4–6, 8, 9, 16–17, 17–21, R. 145–146). Rejecting the Unions' suggestions that decision on this issue should be held in abeyance until the Board had passed on the question or that the proposed agreement be amended to include this provision only if the Board upheld its legality, petitioner persisted in its demand for immediate inclusion of the superseniority clause (P. A. 55–58; 11–12, 30–31, B. A. 17–21, G. C. Exh. 25, 26).

II. THE BOARD'S CONCLUSIONS AND ORDER

Upon the foregoing facts and the entire record, the Board found (P. A. 37, 38) that petitioner, by adopting and implementing the superseniority policy after the strike, was "motivated, not by any legitimate eco-

nomic interest of its own, but by a desire to punish the complainants for exercising the right guaranteed in Section 7 to engage in concerted activities, and a wish to reward the other employees for abandoning or not participating in the strike." Accordingly, the Board concluded that petitioner's policy discouraged membership in the Unions which the employees had selected as their bargaining representatives, in violation of Section 8 (a) (3) of the Act, or infringed upon the employees' general statutory right to engage in concerted activities for mutual aid or protection, in violation of Section 8 (a) (1). In concluding that petitioner's seniority policy was prompted by a purpose to penalize its employees for having exercised their statutory rights, the Board considered it highly significant (P. A. 37) that it was not until the strike was over, and all the strikers had been put back to work, that petitioner for the first time decided on the plan to separate its employees into the two seniority groups for layoff purposes. The Board also noted (*ibid.*) that there was no claim by petitioner, and no suggestion in the record, that petitioner had promised employees superseniority in order to get them to work during the strike or, indeed, that it had ever mentioned the matter of relative seniority to any employee until after the strike was over and all the strikers had been reinstated.

The Board also concluded (P. A. 38–40) that petitioner had violated Section 8 (a) (5) and (1) of the Act by refusing to bargain in good faith with the Unions. The Board's finding of bad faith was predicated upon the retaliatory nature of the seniority

clause; petitioner's insistence that the Unions accede to that clause or forego any contract at all; and petitioner's conduct during March and April 1954 (when it rejected the Unions' request for a bargaining conference by stating that their proposals should be made through the Federal Mediation and Conciliation Service; turned down another request for a meeting with the advice that the Unions' proposals should be submitted in writing; and then refused to meet on the ground that further negotiations would be futile).

The Board ordered petitioner to cease and desist from the unfair labor practices found and from infringing in any manner upon its employees' exercise of their statutory rights. Affirmatively, the Board ordered petitioner to reinstate the seven unlawfully laid-off employees and to make them whole for any loss of pay suffered by reason of the discrimination against them; to rescind its discriminatory seniority policy and restore all employees affected thereby to the seniority they would have enjoyed absent such discriminatory policy; to bargain with the Unions upon request; and to post appropriate notices (P. A. 40–42, 74–76).

III. THE DECISION BELOW

The court below (Chief Judge Parker and Judge Dobie, with Judge Soper dissenting) accepted all of the Board's findings of fact and conclusions of law and enforced the Board's order (R. 25–34).

Rejecting petitioner's contention that its superseniority policy was a permissible measure comparable to the replacement of economic strikers sanctioned by *National Labor Relations Board* v. *Mackay Radio &*

Telegraph Co., 304 U. S. 333, the court distinguished that case on the ground that, while an employer may be entitled to promise replacements permanent employment in order to keep his plant in operation during a strike, petitioner discriminated in favor of "loyal employees" *after* the strike, i. e., not to keep operating, but in order to penalize the strikers and discourage future strikes. In this respect, the court observed (R. 28–29):

> The strike was over, the strikers had returned to work. The Olin plant was in full operation. * * * Olin, after the strike, when there was no necessity for such action to keep its plant in operation, promulgated its superseniority policy in favor of the so-called "loyal employees" and against those who returned to work after the strike had failed and was over. Olin was clearly penalizing the strikers for exercising their right to strike and was thereby clearly discouraging any exercise of this right in the future. This, we think, Olin cannot lawfully do. Olin's attorney, Stull, admitted in one of the conferences with Union representatives that Olin's insistence on the superseniority plan was motivated by Olin's preference for employees who had been loyal to Olin by helping to break the strike, and also Olin's concern that the plant be not "shut down again."

Distinguishing *National Labor Relations Board* v. *Potlatch Forests, Inc.*, 189 F. 2d 82 (C. A. 9), Judge Parker's opinion points out that in *Potlatch* the employer advocated its seniority policy before the strike was settled; that there was no evidence that his motive

was to penalize the strikers; and that the "replacements" included some new employees. The court below also indicated that it disagreed, in any event, with the Ninth Circuit's failure to distinguish between promises of permanent tenure made during a strike in order to procure replacements and the post-strike imposition of a superseniority policy favoring "loyal employees" and prejudicing reinstated strikers.

Finally, upon the basis of the "entire course of the bargaining", as well as petitioner's insistence upon superseniority, the lower court found adequate record support for the Board's finding that petitioner had refused to bargain in good faith with the Unions.

SUMMARY OF ARGUMENT

1. The Board and the court below properly found that petitioner's seniority policy favoring "loyal" employees was discriminatory within the meaning of the Act and violative of Section 8 (a) (3) and (1). The record discloses that, after the strike was over and all the strikers had returned to work, petitioner for the first time decided to separate its employees into two groups for lay-off purposes: one group consisting of those who remained at work during the strike or abandoned the strike; the other comprising those who remained out until the strike failed. This was done for the avowed purpose of rewarding the "loyal" employees and discouraging future strikes. Petitioner implemented this policy when it laid off seven full-term strikers who were senior in point of service to a corresponding number of retained employees who had returned to work before the end of the strike.

Sections 7 and 13 of the Act assure to employees the right to engage in concerted activities for mutual aid or protection. This includes the right to engage in peaceful strikes over terms and conditions of employment. To carry out this basic policy, Congress, in Section 8 (a) (1), forbade abridgement by an employer of the rights accorded by Section 7; and, in Section 8 (a) (3), it forbade discrimination in employment on the basis of union activity or other concerted activity for mutual aid or protection.

The seniority policy which petitioner adopted and implemented—a policy based solely on the employees' participation or non-participation in concerted activity which the Act normally protects—plainly discriminated against the full-term strikers, and a necessary consequence of such disparate treatment was to discourage resort to strike action in the future. The penalty thus visited upon the full-term strikers constitutes a patent infringement of the statutory right to engage in peaceful strikes.

The decision of this Court in *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 345–346, does not support petitioner's attempted justification of its seniority policy. In that case, this Court held that, during a strike, an employer may replace economic strikers in an effort to maintain business operations, and that he need not discharge the replacements to make room for returning strikers. Apart from other considerations, the decisive difference between *Mackay* and the instant case is that here petitioner, as it concedes, adopted and implemented the discriminatory seniority policy

after all the employees had resumed work. Once the strikers had returned to work, any allocation of permanent jobs on the basis of the employees' participation in the strike could no longer be justified on the ground that it was necessary to keep petitioner's business operating during the strike. Petitioner's asserted desire to protect its business against possible future strikes does not excuse an infringement upon the rights guaranteed employees by the Act. Moreover, nothing in the record suggests that the return to work was merely a tactical maneuver or that any resumption of the strike was contemplated.

Nor does it aid petitioner that all of the employees were union members and that, so far as appears, none of them withdrew from membership. The Act proscribes "discrimination to discourage participation in union activities as well as to discourage adhesion to union membership," and it is not necessary to show by "immediate manifestations," the impact upon the employees' exercise of their statutory rights (*Gaynor News Company* v. *National Labor Relations Board,* 347 U. S. 17, 39–40, 51). Equally unavailing to excuse petitioner's conduct is the absence of a contract governing seniority. While the Act does not confer any specific seniority rights upon employees, it clearly prohibits any form of discrimination grounded on participation in protected activities.

2. The Board and the court below properly found that petitioner refused to bargain in good faith by its insistence upon a discriminatory seniority clause and by its dilatory tactics in responding to the Unions' requests for bargaining conferences.

ARGUMENT

I. THE BOARD AND THE COURT BELOW PROPERLY FOUND THAT PETITIONER'S SENIORITY POLICY, FAVORING EMPLOYEES WHO ABANDONED THE STRIKE OR DID NOT PARTICIPATE IN IT, WAS DISCRIMINATORY WITHIN THE MEANING OF THE ACT AND IN VIOLATION OF SECTION 8 (a) (3) AND (1)

The statutory protection vouchsafed by the Act to employees who engage in peaceful strikes over terms and conditions of employment is not open to question. "Congress safeguarded the exercise by employees of 'concerted activities' and expressly recognized the right to strike." *International Union, U. A. W.* v. *O'Brien*, 339 U. S. 454, 457; *Amalgamated Association* v. *W. E. R. B.*, 340 U. S. 383, 389, 404; *National Labor Relations Board* v. *International Rice Milling Co.*, 341 U. S. 665, 672, n. 6. By Section 2 (3) of the Act it preserved to such strikers their status as employees, and by Section 7 it declared that employees "shall have the right" to engage in "concerted activities" for "mutual aid or protection." *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 344–345. To implement this right, Congress, in Section 8 (a) (1), forbade abridgement by an employer of the rights guaranteed by Section 7; and in Section 8 (a) (3) it forbade discrimination in employment to "discourage participation in union activities as well as to discourage adhesion to union membership." *Radio Officers' Union* v. *National Labor Relations Board*, 347 U. S. 17, 29–42. Special legislative solicitude for the right to strike was again expressed in Section 13, which states that "Nothing

in this Act, except as specifically provided for herein, shall be construed so as * * * to interfere with or impede or diminish in any way the right to strike * * *." *National Labor Relations Board* v. *International Rice Milling Co.*, 341 U. S. 665, 673; *Mastro Plastics Corp.* v. *National Labor Relations Board*, 350 U. S. 270, 284.

It can scarcely be denied that petitioner's seniority policy discriminated against the full-term strikers, and that a necessary consequence of such disparate treatment, based solely on participation in concerted activity which the Act normally protects, would be to discourage resort to strike action in the future. *Gaynor News Co., Inc.* v. *National Labor Relations Board*, 347 U. S. 17, 46. As set forth above, pp. 3–4, after the strike was over and all the strikers had returned to work, petitioner for the first time decided to separate its employees into two groups for lay-off purposes: one group consisting of those who remained at work during the strike or abandoned the strike; the other comprising those who remained out until the strike failed. Petitioner implemented this policy when it laid off the seven full-term strikers who were senior in point of service to a corresponding number of retained employees who had returned to work before the end of the strike. The penalty thus visited upon the full-term strikers constitutes a patent infringement of their statutory right to engage in strike action for purposes of mutual aid or protection, in violation of the statutory bans forbidding discrimination against employees for engaging in concerted

activity and interference with their exercise of the rights guaranteed by Section 7 of the Act.

To be sure not every action of an employer which may be said, in a literal sense, to inhibit the exercise of the right to strike necessarily constitutes a violation of the Act. Although the statutory protection accorded to the right to strike (unless exercise of that right is otherwise expressly prohibited) is couched in absolute terms, the right, like others guaranteed by the Act, must necessarily be balanced against other competing legitimate interests of society in general or of the employer in particular. And the Board, consistent with the statutory policies and objectives, may appropriately accommodate such competing interests. See *National Labor Relations Board* v. *Babcock & Wilcox Co.*, 351 U. S. 105, 112; *Republic Aviation Corp* v. *National Labor Relations Board*, 324 U. S. 793, 797. Thus, the interest of society in the lawful, peaceful conduct of a strike may, on balance, result in the loss of statutory protection for the striker who acts in an unlawful manner or for an unlawful purpose.[3]

[3] See, e. g., *National Labor Relations Board* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240, 252–259; *National Labor Relations Board* v. *Sands Mfg. Co.*, 306 U. S. 332, 343–344; *Southern Steamship Co.* v. *National Labor Relations Board*, 316 U. S. 31; *Allen-Bradley Local* v. *Wisconsin Employment Relations Board*, 315 U. S. 740, 750–751. Moreover, the Act itself contains four express limitations on the right to strike: Sections 8 (b) (4), 8 (d), 206–210, 305. See *International Union, U. A. W.* v. *O'Brien*, 339 U. S. 454, 457. No such considerations are involved here, as the conduct of the strike was exemplary in all respects, its purpose lawful, and the Unions complied with all notice requirements of Section 8 (d) before the strike action was taken (P. A. 46–47, n. 3; 19–31).

Similarly, it was early recognized by this Court that the employer's legitimate interest in the continuing operation of his plant was a right to be balanced against the broad statutory protection granted economic strikers. Accordingly, in *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 345–346, the Court held that, notwithstanding the statutory provisions guaranteeing employee status to strikers whose work had ceased as the result of a current labor dispute,[4] an employer, who had committed no unfair labor practice, might "replace the striking employes with others in an effort to carry on the business" during the strike, even though such measures might incidentally tend to inhibit the striking employees. The Court stated (*ibid.*):

> * * * an employer, guilty of no act denounced by the statute, has [not] lost the right to protect and continue his business by supplying places left vacant by strikers. And he is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them. The assurance by [the employer] to those who accepted employment during the strike that if they so desired their places might be permanent was not an unfair labor practice nor was it such to reinstate only so many of the strikers as there were vacant places to be filled. [Footnote omitted.]

The theory of that case, in short, was that an employer is not required to underwrite an economic strike by shutting down while it is in progress and reinstating

[4] Section 2 (3) of the Act, unchanged by the 1947 amendments.

the strikers after it is over. The employer is entitled to keep his plant running if he can find men to do the work of the strikers. If he could hire men only for the duration of the strike, subject to displacement on the return of the strikers, he obviously would have little or no chance of hiring anyone. The balance between the employee's risk of losing his job by striking and the employer's risk of losing his business through an inevitable shutdown was struck in favor of the employer.

Petitioner seeks to bring itself within the *Mackay* rule. The facts establish, however, that petitioner granted preferential tenure to employees who abandoned or did not participate in the strike, and discriminated against those who remained on strike until the end, *not* for the purpose of maintaining operations during the strike, but in order to reward the "loyal employees," to penalize the full-term strikers for having exercised their statutory right to strike, and to discourage the exercise of that right in the future. It was not until the strike was over and all the strikers had been reinstated—when, as the court below pointed out, "there was no necessity for such action to keep its plant in operation" (R. 29)—that petitioner for the first time announced and implemented its seniority policy giving preference to "loyal" employees. There is no claim by petitioner, and no suggestion in the record, that petitioner ever made any promise of preferred tenure in order to obtain a work force while the plant was struck (P. A. 37). Moreover, petitioner's representatives acknowledged that the new layoff policy was motivated by a pref-

erence for employees who had helped to break the strike and by a concern that the plant be not "shut down * * * again" (P. A. 37, 61, 63; B. A. 8, 22). Thus, unlike the action of the employer in *Mackay,* petitioner's seniority policy giving preference to "loyal employees" was not bottomed upon any legitimate considerations of carrying on its business during the strike which might, on balance, justify some incidental infringement of the right to strike. In the absence of such countervailing considerations, the unrestricted prohibitions of the Act, directed against disparate treatment of employees on the basis of their participation in concerted activity and against interference with the exercise of the employees' statutory rights, come into play. This is particularly so where the employer, as here, is prompted by an avowed purpose to reward the "loyal employees" and, conversely, to penalize the full-term strikers and thus discourage future strikes.[5] Such discrimination and interfer-

[5] Whether petitioner's conduct be viewed as a reward to the "loyal employees" or a reprisal against the full term strikers, "the nature of the policy was such," as the trial examiner pointed out (P. A. 61–62), "that the reward could not be paid one except by simultaneously punishing another." Since the purpose and effect of petitioner's action, in either event, was to induce employees to refrain from striking in the future, it constituted an interference with the exercise of a statutorily protected right. "[I]nterference is no less interference because it is accomplished through allurements rather than coercion * * *" (*Western Cartridge Co.* v. *National Labor Relations Board*, 134 F. 2d 240, 244 (C. A. 7), certiorari denied, 320 U. S. 746). *National Labor Relations Board* v. *West Coast Casket Co., Inc.*, 205 F. 2d 902, 905 (C. A. 9); *National Labor Relations Board* v. *Bailey Co.*, 180 F. 2d 278, 279–280 (C. A. 6); *National Labor Relations Board* v. *Crown Can Co.*, 138 F. 2d 263, 266 (C. A. 8), certiorari denied, 321 U. S. 769. See also, Section 8 (c) of the Act.

ence are plainly interdicted by the Act. The alteration of employment status is normally discriminatory where it is in "punishment for, or discouragement of, such activities as the act declares permissible." *Associated Press* v. *National Labor Relations Board*, 301 U. S. 103, 132.[6]

[6] Petitioner relies on *National Labor Relations Board* v. *Potlatch Forests, Inc.*, 189 F. 2d 82, 86, where the Court of Appeals for the Ninth Circuit held that similar conduct by an employer did not evidence a purpose to penalize full-term strikers or discourage future strikes. The strike seniority policy in *Potlatch* is identical to petitioner's in substance and only technically distinguishable as to timing, since the policy there was first proposed in the course of strike settlement negotiations two days before the end of a two-month strike, but after the strike had failed and the plant had been back in operation for some time (189 F. 2d at 83–84). Although the employer in that case had already procured enough employees to carry on his business without any mention of preferential seniority and the remaining strikers were then attempting to return to work, the Ninth Circuit nevertheless concluded that the employer's seniority policy was consistent with a nondiscriminatory object of continuing operations during the strike. In holding that a punitive purpose was not established, the court stated that the "only evidence to support such a finding is the conclusion that Potlatch must have realized the inevitable consequences of the policy" (189 F. 2d at 86).

We think that the Ninth Circuit erred in reaching this conclusion. In our view, the timing of the seniority policy precluded a finding that the employer was prompted by a purpose to induce employees to work during the strike. And since the nature of the discrimination was inherently such as to discourage strike activity, specific proof of an intent to discourage future strikes was, as this Court has since held, unnecessary. *Radio Officers' Union* v. *National Labor Relations Board*, 347 U. S. 17, 44–46. In any event, the instant case, on the findings made by the Board and affirmed by the court below, may be distinguished from *Potlatch*. Here, the decision below as to petitioner's punitive purpose is based not only upon the timing of the seniority policy, but also on independent evidence of petitioner's desire to reward the "loyal employees," and, by necessary implication, to punish the full-term strikers and thereby discourage future strikes.

Petitioner asserts, however (Br. 20, 27), that, since it had decided prior to the strike to eliminate some of the jobs for economic reasons, it could treat those employees who remained at work or abandoned the strike as having replaced the strikers in the permanent jobs. Thus, it argues that "the strikers who remained out were entitled only to what residue was available when they applied for reinstatement." But this contention overlooks petitioner's concession (Br. 23–24) that "at the time the strikers returned to work the Company had not as yet formally designated the positions in the maintenance unit which it intended to continue in its job structure, nor had it designated which positions it intended to eliminate." Thus, not only were no new employees hired during the strike (compare *Mackay*); it is not even suggested that any employee who worked during the strike ever displaced any full-term striker in his job. So far as appears—and petitioner's concession confirms this—at the conclusion of the strike, all of the employees occupied their pre-strike jobs. It was after all of the men were back on the payroll and before "the composition of the layoff had * * * been decided" (Pet. Br. 8) that petitioner divided its employees into two groups for lay-off purposes.[7] Thus, it is apparent that at no time during the strike, when the employer's legitimate in-

[7] Corroborative of the fact that there was no change in the strikers' job status until after the strike was over are petitioner's further statements in connection with the refusal-to-bargain issue. Thus, petitioner concedes (Br. 15) that it first mentioned the matter of strike seniority to the Unions at the April 2 bargaining session, and further asserts (Br. 5, 10, 24, 38) that it bargained with the Unions to an impasse "before putting the plan into effect" (Br. 24).

terest in continuing operations might, on balance, have justified such action,[8] did petitioner attempt, in the *Mackay* sense, to replace the full-term strikers in the permanent jobs. Once the strike was over, any differentiation between the strikers and "loyal employees" solely on the basis of their participation in the strike was without color of justification.

The nature of the permanent tenure which petitioner conferred upon the favored group of employees likewise differs significantly from the kind of permanent tenure involved in *Mackay*. In that case, this Court observed that an employer, in order to carry on his business during a strike, could lawfully give

[8] Petitioner suggests (Br. 30) that under Board decisions it would have committed an unfair labor practice had it sought to recruit a working force during the strike by offering those who remained at work or abandoned the strike greater seniority than the full-term strikers. The Board and some of the courts of appeals have held, generally, that an employer violates Section 8 (a) (1) of the Act when he resorts to threats or promises of benefit to coerce strikers to return to work, and, also, that he violates Section 8 (a) (5) when such solicitation has been conducted under circumstances, and in a manner, reasonably calculated to undermine the strikers' bargaining representative. See, e. g., *The Texas Company*, 93 NLRB 1358, 1360–1362; *American Rubber Products Corp.* v. *National Labor Relations Board*, 214 F. 2d 47, 54 (C. A. 7); *National Labor Relations Board* v. *James Thompson & Co., Inc.*, 208 F. 2d 743, 748–749 (C. A. 2); *National Labor Relations Board* v. *Bradley Washfountain Co.*, 192 F. 2d 144, 152–154 (C. A. 7); *Dinion Coil Co.*, 110 NLRB 196, 197, 202–203. However, it is an unresolved issue whether an employer who has determined, before a strike occurs, to make some layoffs may seek, during the strike, to retain a working force by promising the permanent jobs to those who remain at or return to work. In any event, the instant case does not call for a resolution of this issue; for, as stated above, the strike was over when petitioner announced its seniority policy.

"assurance * * * to those who accepted employment during the strike that * * * their places might be permanent" (304 U. S. at 346). This meant that the employer was "not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment * * *" (304 U. S. at 345). But to say that a replacement need not be dislodged at the election of the man replaced does not remotely suggest that replacements would acquire rights superior to strikers who are reinstated. In the instant case, however, petitioner would place all "replacements" in a favored class superior to unreplaced reinstated strikers—a result plainly at odds with Section 2 (3) of the Act which provides that employee status is not interrupted by participation in a strike.

Nor does it follow that because, under *Mackay,* petitioner might have been free to replace the strikers altogether during the strike, it was free, after the strike, to visit the lesser sanction of replacing them on the seniority ladder. Such a contention reduces itself to the claim that economic strikers, who are reinstated, no longer enjoy the full protection of the Act. This argument wholly misconceives the *Mackay* ruling. In that case, the employer's right to hire replacements did not grow out of any right to visit sanctions upon the strikers, but solely out of his right to carry on his business during the strike.[9] An em-

[9] This is demonstrated, for example, by the cases which hold that once economic strikers have applied for reinstatement the employer is not free to replace them. *Home Beneficial Life Ins. Co.* v. *National Labor Relations Board*, 159 F. 2d 280, 285 (C. A. 4), certiorari denied, 332 U. S. 758; *Firth Carpet Co.* v. *National*

ployer is not free to administer punishment to employees who have lawfully exercised a right protected by the Act, and hence to speak of a "lesser" sanction is wide of the mark. The employer is free to continue operations during the strike and, to that end, to replace economic strikers, but, as we have seen, the so-called seniority adjustment adopted by petitioner after the strike was not bottomed upon that consideration. On the contrary, its purpose and effect were discriminatory and punitive.

Petitioner further asserts (Br. 27–30) that, when it announced its seniority policy, there had been no strike settlement and there was nothing to prevent the Unions from resuming the strike. In these circumstances, petitioner contends, it was entitled to accord the employees who had remained at work or abandoned the strike preferential treatment, so that, in the event of another strike, it could be assured of a loyal working force to maintain operations.

The answer to this contention is twofold. In the first place, nothing in the record suggests that the return of the full-term strikers was merely a tactical maneuver and that the Unions contemplated resuming the strike. As a matter of fact, the strike was not resumed. Nor is it of any consequence that no agreement had been reached between petitioner and the Unions settling their outstanding differences. A strike may be lost and come to an end without any

Labor Relations Board, 129 F. 2d 633, 636 (C. A. 2); *National Labor Relations Board* v. *Shenandoah-Dives Mining Co.*, 145 F. 2d 542, 547–548 (C. A. 10); *National Labor Relations Board* v. *Clausen*, 188 F. 2d 439, 442 (C. A. 3), certiorari denied, 342 U. S. 868.

settlement. And it has not hitherto been suggested that a strike continues to be in effect, even though the employees abandon it and return to work, merely because they may be called out on strike again if the parties are unable to reach an accord.

Secondly, and more broadly, we submit that an employer's desire to protect his business against possible future strikes cannot serve as justification for infringing the rights which the Act guarantees to employees. Employers are frequently opposed to concerted activity by their employees because of a desire to promote or protect their own economic interests. If such self-interest, standing alone, could justify the adoption of measures prejudicial to employees who had engaged in concerted activities, there would be little left to the guarantees of the Act.[10] Accordingly, an employer has been held to violate the Act when he attempts to avert an impending or anticipated future strike by threatening the would-be strikers with reprisals.[11] Similarly, discrimination or other unfair labor practices against employees are not excused by an employer's fear that economic pressure will be exerted upon him by one of the unions engaged in a

---

[10] Cf. e. g. *Duluth Bottling Assn.*, 48 NLRB 1335, 1336, 1359–1360; *Betts Cadillac Olds, Inc.*, 96 NLRB 268; *International Shoe Co.*, 93 NLRB 907, where other special circumstances were present.

[11] *Collins Baking Company* v. *National Labor Relations Board*, 193 F. 2d 483, 485–487 (C. A. 5); *Cusano* v. *National Labor Relations Board*, 190 F. 2d 898, 901–902 (C. A. 3); *Berkshire Knitting Mills* v. *National Labor Relations Board*, 139 F. 2d 134, 140 (C. A. 3); *National Labor Relations Board* v. *Trojan Powder Co.*, 135 F. 2d 337, 339 (C. A. 3).

jurisdictional dispute,[12] by other of his employees,[13] or by his customers.[14] Just as the employer's current "self-interest," in *Gaynor News*, 347 U. S. at 37, 46, could not immunize from the sanctions of the Act the disparate treatment of union and non-union employees in that case, *a fortiori*, an employer's desire to protect his business against future strikes may not legitimize discriminatory measures against employees who have engaged in strike action. To permit an employer, as here, to visit reprisals upon strikers and to accord preferential treatment to those who remain at work, in order to discourage future resort to strike action and to insure a loyal working crew in the event of a strike, would go far to nullify the right to strike. Indeed, carried to its logical conclusion, petitioner's rationale would permit an employer to discharge employees who struck in the past simply on the theory that they might do so again in the future—a result manifestly at odds with settled law.[15]

---

[12] *National Labor Relations Board* v. *National Broadcasting Co.*, 150 F. 2d 895, 900 (C. A. 2); *National Labor Relations Board* v. *Gluck Brewing Co.*, 144 F. 2d 847, 852, 853 (C. A. 8); *McQuay-Norris Mfg. Co.* v. *National Labor Relations Board*, 116 F. 2d 748, 752 (C. A. 7); *National Labor Relations Board* v. *Star Publishing Co.*, 97 F. 2d 465, 470 (C. A. 9); *National Labor Relations Board* v. *Polson Logging Co.*, 136 F. 2d 314 (C. A. 9).

[13] *National Labor Relations Board* v. *McCatron*, 216 F. 2d 212 (C. A. 9), certiorari denied, 348 U. S. 943; *Wilson & Co., Inc.* v. *National Labor Relations Board*, 123 F. 2d 411, 417–418 (C. A. 8).

[14] *Idaho Potato Growers* v. *National Labor Relations Board*, 144 F. 2d 295, 302–303 (C. A. 9); *McQuay-Norris Mfg. Co.* v. *National Labor Relations Board*, 116 F. 2d 748, 752 (C. A. 7).

[15] *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 344–345, 347–348; *National Labor Rela-*

Petitioner also notes (Br. 12) that all of the employees were union members and that, "as far as the record shows, none of them withdrew from membership." If petitioner means to suggest that these circumstances absolve it of liability under the Act, it is clearly in error. The Act does not require that the impact upon the employees' exercise of their statutory rights have "immediate manifestations." *Gaynor News, supra,* 347 U. S. at 51. "If there is a reasonable likelihood that the effects may be felt years later, then a reasonable interpretation of the Act demands that the employer be deemed a violator." *National Labor Relations Board* v. *Gaynor News Company,* 197 F. 2d 719, 722–723 (C. A. 2), affirmed, 347 U. S. 17, 38, 51, 55. Restraint upon the future exercise of a statutory right is "a natural consequence of discrimination," and petitioner is accountable for "increasing the number of workers" who would want to refrain from striking "and/or their quantum of desire" to engage in such activity. *Gaynor News, supra,* 347 U. S., at 38, 46. Nor is it of consequence that the favored and penalized employees were all union members. The proscription of Section 8 (a) (3) includes

---

tions Board v. *Remington Rand, Inc.*, 130 F. 2d 919, 928 (C. A. 2); *Firth Carpet Co.* v. *National Labor Relations Board*, 129 F. 2d 633, 635 (C. A. 2); *National Labor Relations Board* v. *Sandy Hill Iron & Brass Works*, 165 F. 2d 660, 663 (C. A. 2); *National Labor Relations Board* v. *Stackpole Carbon Co.*, 105 F. 2d 167, 176 (C. A. 3); *Home Beneficial Life Insurance Co.* v. *National Labor Relations Board*, 159 F. 2d 280, 285 (C. A. 4), certiorari denied, 332 U. S. 758; *National Labor Relations Board* v. *Good Coal Co.*, 110 F. 2d 501, 502–503 (C. A. 6), certiorari denied, 310 U. S. 630; *Carter Carburetor Co.* v. *National Labor Relations Board*, 140 F. 2d 714, 717–718 (C. A. 8).

"discrimination to discourage participation in union activities as well as to discourage adhesion to union membership." *Radio Officers, supra,* 347 U. S. at 39–40. A strike, as here, to support a union's bargaining position is manifestly union activity. Economic sanctions against employees for giving such support to their union necessarily tends to discourage adherence to the union within the meaning of Section 8 (a) (3). In the instant case, the bite of the economic sanctions adopted by petitioner has already been brought home forcefully to petitioner's employees by the dismissal of seven men who otherwise would not have lost their jobs.

Petitioner further argues (Br. 31–34) that because seniority rights derive from union contracts, and not from the Act, it was accordingly free, in the absence of a contract, to establish its own seniority policy or to ignore seniority altogether. However, the unfair labor practice here does not stem from the fact that petitioner deprived employees of seniority or failed to follow the provisions of the expired contracts; it is founded upon petitioner's use of a discriminatory and impermissible criterion as the basis of its new seniority policy, i. e., participation in a strike. The Act prohibits discrimination by employers on the basis of union membership (or lack of it) or on the basis of participation in protected concerted activities. And the protection of Section 8 (a) (3) extends to "all elements of the employment relationship which in fact customarily attend employment and with respect to which an employer's discrimination may as readily be the means of interfering with employees'

right of self-organization as if these elements were precise terms of a written contract of employment." *National Labor Relations Board* v. *Waterman S. S. Corp.*, 309 U. S. 206, 218.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT PETITIONER VIOLATED SECTION 8 (a) (5) AND (1) OF THE ACT BY REFUSING TO BARGAIN IN GOOD FAITH WITH THE UNIONS REPRESENTING ITS EMPLOYEES

Petitioner implicitly concedes (Br. 34–35) that acceptance of the Board's view with respect to the illegality of the seniority policy necessarily entails acceptance of the Board's further finding that petitioner violated its statutory bargaining obligation by insisting that any contract contain the objectionable seniority clause. See *National Labor Relations Board* v. *Pecheur Lozenge Co.*, 209 F. 2d 393, 403 (C. A. 2), certiorari denied, 347 U. S. 953; *National Labor Relations Board* v. *National Shoes, Inc.*, 208 F. 2d 688, 691–692 (C. A. 2); *National Labor Relations Board* v. *Reed & Prince Mfg. Co.*, 205 F. 2d 131, 134–135 (C. A. 1), certiorari denied, 346 U. S. 887; *National Labor Relations Board* v. *Dalton Telephone Co.*, 187 F. 2d 811 (C. A. 5), certiorari denied, 342 U. S. 824; *National Labor Relations Board* v. *Tower Hosiery Mills*, 180 F. 2d 701, 703–705 (C. A. 4), certiorari denied, 340 U. S. 811; *National Labor Relations Board* v. *Corsicana Cotton Mills*, 178 F. 2d 344, 346–347 (C. A. 5).

Moreover, the Board's finding of a refusal to bargain rests not only on petitioner's unlawful insistence on a discriminatory seniority clause, but also on petitioner's dilatory tactics in responding to the Union's requests for bargaining conferences. Thus, after the

strike began, petitioner met with the Unions only twice in a period of one year, parrying requests for other conferences with statements that proposals should be submitted in writing or through the Federal Mediation and Conciliation Service, or that a meeting would be futile (*supra*, pp. 5–6). Petitioner's stalling tactics would appear sufficient, without more, to support a finding of bad-faith bargaining. *National Labor Relations Board* v. *United States Cold Storage Corp.*, 203 F. 2d 924, 928, 929 (C. A. 5); *National Labor Relations Board* v. *Jacobs Mfg. Co.*, 196 F. 2d 680, 683 (C. A. 2); *National Labor Relations Board* v. *Gittlin Bag Company*, 196 F. 2d 158, 159 (C. A. 4); *National Labor Relations Board* v. *Andrew Jergens Co.*, 175 F. 2d 130, 132–134 (C. A. 9), certiorari denied, 338 U. S. 827; *National Labor Relations Board* v. *National Shoes, Inc.*, 208 F. 2d 688, 692 (C. A. 2). However, since the finding of bad faith here is enmeshed with the finding that discriminatory motivation lies at the root of petitioner's seniority clause, we think it would be appropriate, should this Court disagree with the Board's position on the seniority issue, that the Court remand to the Board to permit it to pass upon the question whether petitioner has otherwise refused to bargain in good faith.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be affirmed.

J. LEE RANKIN,
Solicitor General.

KENNETH C. MCGUINESS,
General Counsel,
STEPHEN LEONARD,
Associate General Counsel,
DOMINICK L. MANOLI,
Assistant General Counsel,
RUTH V. REEL,
Attorney,
National Labor Relations Board.

JANUARY 1957.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., 151, *et seq.*), are as follows:

DEFINITIONS

SEC. 2. When used in this Act—

* * * * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, * * *

* * * * *

(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association, or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

* * * * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mu-

tual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. * * *

* * * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of

employees with or without back pay, as will effectuate the policies of this Act. * * *

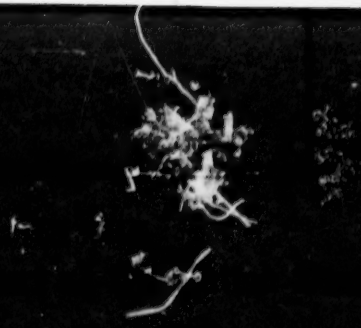
* * * * *

LIMITATIONS

SEC. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

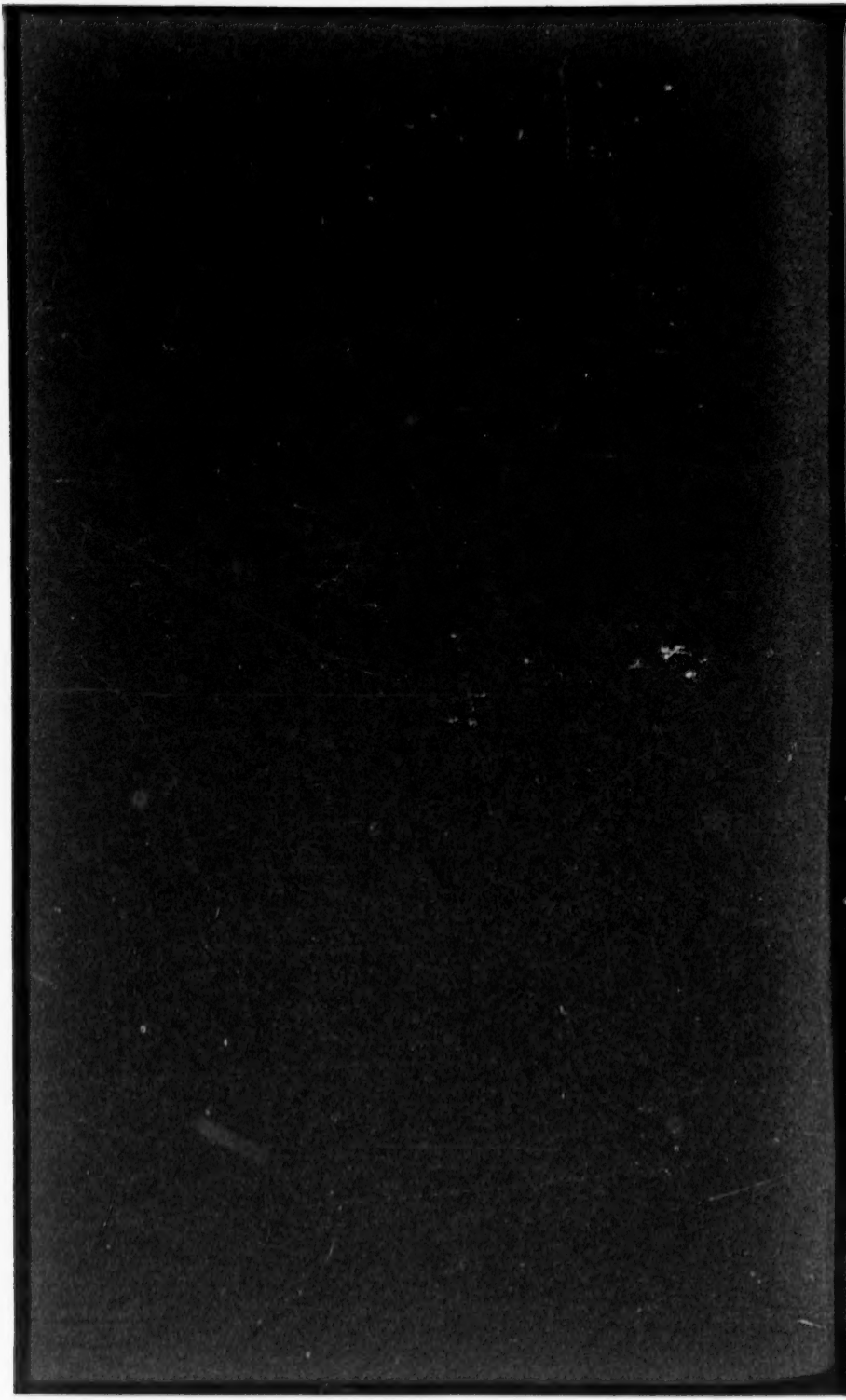
* * * * *

U. S. GOVERNMENT PRINTING OFFICE: 1987



Wm. A. Bryan
188 East Main Street
Abingdon, Virginia
Counsel of Record
for Petitioner

H. W. Stutz
Olin Mathieson Chemical Corporation
460 Park Avenue
New York 22, New York
Of Counsel



INDEX

Page

(1) When Strikers Returned on March 17 There Was Available to Them Only a Limited Number of Permanent Jobs and Hence No Mass Reinstatement Occurred 2

(2) The Timing of the Announcement of Permanent Tenure Was Not Material 5

(3) The Unions Had Not Abandoned Their Demands When They Ordered the Remaining Strikers Back to Work and Were Free to Order Them Out Again at Any Time 8

(4) Petitioner's Purpose Was Not to Reward Nor to Penalize 10

CITATIONS

CASES:

Anniston Yarn Mills, Inc., 103 NLRB 1495 5
International Shoe Company, 93 NLRB 970, 909 10
International Union v. *Wisconsin Employment Relations Board*, 336 U.S. 245, 249 10
U. S. Cold Storage Corp., 96 NLRB 1108, 1111 9
V-O Milling Co., 43 NLRB 347, 361 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 153

OLIN MATHIESON CHEMICAL CORPORATION, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

Certiorari to the United States Court of Appeals for the Fourth Circuit to Review a Decree Enforcing an Order of the National Labor Relations Board

---

REPLY BRIEF FOR PETITIONER

After reading the brief filed by the Board, Petitioner has noted that the Board's major arguments are premised upon such a serious misunderstanding of the record that Petitioner feels impelled to file a short reply memorandum to draw the attention of the Court to this aspect of the Board's position.

(1) When Strikers Returned on March 17 There Was Available to Them Only a Limited Number of Permanent Jobs and Hence No Mass Reinstatement Occurred.

The major fallacy in the Board's brief lies in its assumption that "petitioner reinstated the * * * strikers" who returned on March 17, and that, therefore, all strikers were reinstated on that date to permanent jobs (Br. 3).

In taking this position, the Board in its brief ignores, or attempts to minimize, a salient fact and the inescapable implications thereof. As stated in the Board's Statement of Facts (Br. 3): "Prior to the strike, petitioner had decided, for economic reasons, to lay off 94 maintenance employees". But the Board does not accept the necessary concomitant of that fact, i.e., that 94 of the maintenance jobs occupied on February 24 (the date the strike began) were not permanent, but temporary.

The Board attempts to minimize this fact by stating that, "As of the end of the strike, however, it [petitioner] had not yet selected the particular employees to be laid off" (Br. 3), and by pointing to the comment in petitioner's brief that, " . . . at the time the strikers returned to work, the Company had not as yet formally designated the positions in the maintenance unit which it intended to continue in its job structure, nor had it designated which positions it intended to eliminate" (Br. 20). But that is surely immaterial. It is true, of course, that the Company did not, early in February when it decided to eliminate 94 jobs, "formally" advise either the Unions or the employees of its decision. Further, the Company did not then immediately designate the particular employees who would be without jobs as a result of the elimination of 94 jobs.

Nevertheless, there is no escape from the fact that *when the Company decided to eliminate 94 jobs, 94 jobs immediately became temporary jobs the tenure of which depended upon the length of time it would take the Company to effectuate its decision.*

Some interval was necessary before this decision could be implemented by actually laying off employees. The method or formula at first depended upon the outcome of then current union negotiations. Once the strike began, Petitioner's intended force reduction became academic. Instead the Company was faced with the converse problem of staffing even the reduced number of available maintenance jobs. There is a reasonable inference that when the remaining strikers returned in a body, a period had to ensue before petitioner could determine how many and which of the strikers had returned and when the lay off should be made, in view of the backlog of maintenance work which accumulated during the strike.

The two week period which intervened until petitioner had its lay-off schedule ready does not seem to be more than a reasonable length of time for the purpose. The strike ran from February 24 until March 17 but as soon thereafter as returning strikers were sufficient in number to fill the permanent jobs and the temporary needs, the Company promptly performed the "formalities". By no reasonable process of thought can this short intervening period alter the effect of the fact that from early in February 94 maintenance jobs were strictly temporary in nature.

From the fact that there were 94 temporary jobs and 140 (234 minus 94) permanent jobs on February 24

when the strike began, it necessarily follows that there were exactly the same number of temporary and permanent jobs available during the strike and on March 17, when the remaining strikers returned. Hence, strikers who returned to work must be limited in their reinstatement rights to these jobs, temporary and permanent, because these were the only *available* jobs.

Some employees did not join the strike and still others returned to work while other strikers remained out. The Company assigned all the latter to permanent jobs, of which there was then a surplus, owing to the strike. When the remaining strikers returned *en masse* on March 17, they were assigned, in order of length of service, to as many permanent jobs as remained available, leaving 94 of the least senior of them for the 94 temporary jobs available. The Company's written proposal to the Unions regarding seniority was no more than an attempt to "formalize" this action, and was necessary to restrict a seniority provision of the proposed contract which would require the Company to rearrange the basis upon which it had distributed available work to returning strikers.

It may be contended that the Company's failure to inform the various striking employees, at the time of their return, of the permanent or temporary character of their job assignments constitutes a sort of waiver. The fallacy of this theory is apparent, however, when consideration is given to the Company's legal obligations to the strikers who returned while permanent job assignments were still available (referred to on pages 22-3 of our principal brief).

If the Company had "formally" assigned an employee who returned to work (during the strike) on

March 1, for example, to a temporary job, the Company would clearly have violated its affirmative obligation to reinstate a striker to permanent work which the striker was capable of doing and which was then available. It is true that the Company, without running afoul of the law, might have told the junior employees who returned to work during the strike that they would be assigned to temporary work and would be laid off when a sufficient work force of new replacements and senior returning strikers was gathered to man all the permanent work assignments. However, such a procedure would hardly have promoted petitioner's effort "to maintain business operations" during the strike (an effort which the Board concedes in its brief (p. 11) was proper under the *Mackay* doctrine) and would have left the Company open to the obvious suspicion that its action was taken to penalize the striker for his strike activity.[1]

(2) The Timing of the Announcement of Permanent Tenure Was Not Material.

The *Mackay* doctrine is that an employer has "the right to protect and continue his business by supplying places left vacant by strikers" and that subsequently returning strikers are not entitled to displace these replacements. In *Mackay*, the replacements were employees transferred by the employer from one of its other offices. In the present case, the replacements were strikers who had voluntarily abandoned the

[1] Had the Company refused to assign a permanent job to a non-striker while assigning such a job to a striker—particularly at the request of the Unions—it would be subject to a charge of discrimination against an employee because of his *refusal* to engage in strike activity. See *Anniston Yarn Mills, Inc.*, 103 NLRB 1495.

strike and crossed the picket line before the Unions ordered back all the remaining strikers without any strike settlement. Unless it is to be now concluded that a fundamental difference exists between voluntarily returning strikers and other replacements — and we submit there is no basis therefor — then there is no apparent reason why *Mackay* should not be here applicable. *Potlatch* so held.

Potlatch further held that it is immaterial that the employer, as here, did not announce that the replacements' tenure was permanent until the time of bargaining negotiations looking to settlement of the strike. ("The record here does not disclose that (the employer) in fact assured the replacements that their places might be permanent; however that assurance need not be proved." (189 F. 2d, p. 86). But in the present case the court below, rejecting *Potlatch*, held that it *was* material; that the replacements here were not entitled to permanent tenure because, *and only because*, "no promise *when they were employed*, was made . . . that their employment would be permanent" (RA 29). As the court interprets *Mackay*, the legality of the permanent tenure is conditioned upon the facts being such that the employer was under the "*necessity*" of making the advance promise in order to obtain the replacements so as "to keep its plant in operation" (id). Concluding that in the present case such necessity did not exist at the time the permanent tenure was announced, because then the remaining strikers had previously returned to work on orders of the Unions, the court enforced the Board's order. The Board in its brief (p. 17) concedes that an employer could not hope to obtain replacements "only for the duration of the strike" and that the balance between the economic

strikers' "risk of losing his job" and the employer's "risk of losing his business" by shut-down is tipped in favor of the employer by the law. Yet the Board contends that the decision was rightly based upon the ground that petitioner "never made any promise of preferred tenure in order to obtain a work force while the plant was struck" (Br. 17).

The whole decision of principle is thus related solely to the timing of the announcement. This is clearly an extremely narrow ground of decision. It fails to take into account the essential facts that petitioner *in fact required* the replacements (it had notified the Unions that on March 17th it would commence hiring new employees "for some of the jobs which were formerly filled by striking employees" — PA 22); that the replacements whose status is here in question *did in fact enable petitioner to keep the plant in operation;* that they had done everything necessary to be done on their part to qualify for permanent tenure; and finally that the Board itself concedes that if petitioner had made the advance promise of permanent tenure and had thereby successfully induced some of the strikers to cross the picket line, it would then have been open to a Board charge of unfair labor practice for illegal strike-breaking (Br. 21, foot-note). Surely all the substantial elements were here present upon which the replacements were entitled to permanent tenure. Even the Unions knew from petitioner's notice that it would hire permanent replacements, from which they knew or should have known that the replacements already obtained were permanent. But the court below held and the Board contends that one element and only one, was yet lacking, namely an advance promise by petitioner. Aside from the mani-

fest unfairness of thus requiring petitioner to place itself in jeopardy of one unfair labor practice in order to avoid another, it is surely clear that the mere timing of petitioner's announcement should not control the principle involved. The decisive point is that under the circumstances the replacements were of right entitled to the tenure.

The Board concedes that the protection of the right to strike "must necessarily be balanced against other competing legitimate interests." (Br. 15). But the Board in its brief considers only two of these, namely the employer and the remaining strikers. Yet there is a third such interest, i.e., the replacements, which the Board overlooks. They, too, have a "competing legitimate interest," and their right not to strike is as fully protected by the Act as the complainants' right to strike. They, too, must not be discriminated against because they have exercised that right (Sec. 7 of the Act). As pointed out in our principal brief (pages 22-4), they were entitled under the decisions to the status of permanent employees.

(3) The Unions Had Not Abandoned Their Demands When They Ordered the Remaining Strikers Back to Work and Were Free to Order Them Out Again at Any Time.

The Board contends that the employees had "abandoned the strike and returned to work" (Br. 24), that the strike was therefore "over". This argument ignores the fact that the remaining strikers did not voluntarily abandon the strike but returned in a body at the Unions' direction. It was the decision of the Unions, not of the individual employees.

The Unions were still in position to order them out again at any time. It is obvious that if petitioner had

replaced employees then at work with returning strikers and if then the Unions had again ordered out the same body of men, it could not have hoped for returning employees to keep the plant in operation. If, as the Board concedes, an employer "would have little or no chance" of hiring new employees for the duration of the strike only, the same would equally apply to former strikers who had before returned and had then been "bumped" when the remaining strikers had returned.

The Board argues that "nothing in the record suggests that the return of the full term strikers was merely a tactical maneuver and that the Unions contemplated resuming the strike." (Br. 23.) This is inaccurate because the Unions at the bargaining conference on April 2nd, more than two weeks after they had ordered the remaining strikers back, were still maintaining their demand for a wage increase, which was the issue upon which the strike was originally called. And on March 23d, the Unions had written a letter to petitioner containing what can only be construed as a threat to resume the strike unless petitioner met with them forthwith to discuss the strike issue. It cannot be gainsaid that they were free to do so.

It has been held that no obligation arises to make permanent reinstatements where a union letter sent to an employer prior to any strike settlement does not agree to an abandonment of the strike or contain an unconditional request for reinstatement, *U.S. Cold Storage Corp.*, 96 NLRB 1108, 1111, and an offer to return the strikers to work when coupled with union insistence upon resumption of negotiations, has been held as imposing no obligation upon an employer to

reinstate unfair labor practice strikers, *V-O Milling Co.*, 43 NLRB 347, 361.

That unions have employed the procedure of intermittent strikes is disclosed by the decisions. In *International Union* v. *Wisconsin Employment Relations Board*, 336 U.S. 245, 249, "this procedure was publicly described by the union leaders as a new technique for bringing pressure upon the employer". In *International Shoe Company*, 93 NLRB 970, 909, the union employed the same technique. It seems clear that petitioner, in giving permanent employment to the men who had demonstrated that they would stay on the job in spite of the unsettled demands of the Unions and the possibility of further strike calls, was taking a reasonable step in the exercise of its right "to protect and continue his business by supplying places left vacant by the strikers". The strike was not "over" in the sense that it could not be recommenced at any time, and, even on the Board's limited construction of the *Mackay* doctrine, petitioner was within its rights.

(4) Petitioner's Purpose Was Not to Reward Nor to Penalize.

The Board says (Br. 18) that it was petitioner's "*avowed* purpose to reward the 'loyal employees' and conversely to penalize the full term strikers and thus discourage future strikes". This is the Board's interpretation which we think the record does not support. The reference is to statements of petitioner's representatives quoted on pages 4-5 of the Board's brief.

As for the plant manager's statement that petitioner "owed these men an obligation for as much job security as possible", this is reasonably to be construed merely as a recognition of the rights to which the non-

strikers and returning strikers were entitled. The second statement, as reconstructed by a Board witness, was that petitioner's representative felt "that the ones that come across the picket line, etc., deserved a little—well, you might say a little something for helping support the breaking of the strike." If allowance is made for the obvious inexactness of this report of a statement made by the Company's attorney (RA 3), Mr. Kileen, at a collective bargaining conference, the word "deserved" should reasonably be interpreted as no more than a recognition of what these men were entitled to. And the statement that "many realize this plant was shut down before and they don't want to see that happen again", may reasonably be interpreted as referring to the danger of the Unions resuming the strike, if individual employees who had repudiated the strike were laid off to make room for the employees who reported back only upon union instructions.

Respectfully submitted,

WM. A. STUART
188 East Main Street
Abingdon, Virginia

Counsel of Record
for Petitioner

H. W. STULL
Olin Mathieson Chemical Corporation
460 Park Avenue
New York 22, New York

Of Counsel

Dated: January 18, 1957

FEBRUARY 28, 1957.

Decision Per Curiam.

No. 153. OLIN MATHIESON CHEMICAL CORP. *v.* NATIONAL LABOR RELATIONS BOARD. Certiorari, 352 U. S. 819, to the United States Court of Appeals for the Fourth Circuit. Argued February 28, 1957. Decided February 28, 1957. *Per Curiam:* The judgment is affirmed. *Wm. A. Stuart* argued the cause for petitioner. With him on the brief was *H. W. Stull*. *Solicitor General Rankin, Stephen Leonard* and *Dominick L. Manoli* were on the brief for respondent. Reported below: 232 F. 2d 158.

MARCH 4, 1957.

Decisions Per Curiam.